

Pt. 201

17 CFR Ch. II (4-1-00 Edition)

Information collection requirement	17 CFR part or section where identified and described	Current OMB control No.	Expiration date
Form U-R-I	§ 259.221	3235-0152	Do.
Form U-13-60.	§ 259.313	3235-0153	Do.
Form U-3A-2.	§ 259.402	3235-0161	Do.
Form U-3A3-1.	§ 259.403	3235-0160	Do.
Form U-7d	§ 259.404	3235-0165	Do.
Form U-A ..	§ 259.501	3235-0125	Do.
Form ET	§ 259.601	3235-0329	Oct. 31, 1989.
Form ID	§ 259.602	3235-0328	Oct. 31, 1989.
Form SE	§ 259.603	3235-0327	Oct. 31, 1989.
Rules 7a-15 through 7a-37.	§§ 260.7a-15 through 260.7a-37.	3235-0132	Nov. 30, 1990.
Form T-1 ...	§ 269.1	3235-0110	Nov. 30, 1990.
Form T-2 ...	§ 269.2	3235-0111	Nov. 30, 1990.
Form T-3 ...	§ 269.3	3235-0105	Nov. 30, 1990.
Form T-4 ...	§ 269.4	3235-0107	Dec. 31, 1990.
Form ET	§ 269.5	3235-0329	Oct. 31, 1989.
Form ID	§ 269.6	3235-0328	Oct. 31, 1989.
Form SE	§ 269.7	3235-0327	Oct. 31, 1989.
Rule 2A-7 ..	§ 270.2a-7	3235-0268	Sept. 30, 1990.
Rule 2a19-1.	§ 270.2a19-1	3235-0332	Dec. 31, 1991.
Rule 6c-6 ..	§ 270.6c-6	3235-0245	Nov. 30, 1989.
Rule 6c-7 ..	§ 270.6c-7	3235-0276	Jan. 31, 1992.
Rule 6c-9 ..	§ 270.6c-9	3235-0344	Oct. 31, 1989.
Rule 6e	§ 270.6e-2(b)(9).	3235-0177	Feb. 28, 1991.
Rule 7d	§ 270.7d-(b)(8)(i), (iii) and (viii).	3235-0176	Jan. 31, 1990.
Rule 8b-11	§ 270.8b-11 ..	3235-0176	Jan. 31, 1990.
Rule 8b-16	§ 270.8b-16 ..	3235-0176	Jan. 31, 1990.
Rule 8b-20	§ 270.8b-20 ..	3235-0176	Jan. 31, 1990.
Rule 8b-21(b).	§ 270.8b-21(b).	3235-0176	Jan. 31, 1990.
Rule 8b-25	§ 270.8b-25 ..	3235-0176	Jan. 31, 1990.
Rule 8b-32(b).	§ 270.8b-32(b).	3235-0176	Jan. 31, 1990.
Rule 10f-3	§ 270.10f-3 ...	3235-0226	Nov. 30, 1989.
Rule 11a-2	§ 270.11a-2 ..	3235-0272	Jan. 31, 1992.
Rule 12b-1	§ 270.12b-1 ..	3235-0212	July 31, 1991.
Rule 17a-7	§ 270.17a-7 ..	3235-0214	Feb. 28, 1991.
Rule 17a-8	§ 270.17a-8 ..	3235-0235	Feb. 28, 1991.
Rule 17e-1	§ 270.17e-1 ..	3235-0217	Oct. 31, 1990.
Rule 17f-1	§ 270.17f-1 ...	3235-0222	Feb. 28, 1991.
Rule 17f-2	§ 270.17f-2 ...	3235-0223	Oct. 31, 1991.
Rule 17f-4	§ 270.17f-4 ...	3235-0225	July 31, 1990.
Rule 17f-1(g).	§ 270.17f-1(g)	3235-0213	Jan. 31, 1992.
Rule 17j-1	§ 270.17j-1 ...	3235-0224	Nov. 30, 1989.
Rule 18f-1	§ 270.18f-1 ...	3235-0211	Feb. 28, 1991.
Rule 19a-1	§ 270.19a-1 ..	3235-0216	Feb. 28, 1991.
Rule 20a-1(b).	§ 270.20a-1(b).	3235-0158	Sept. 30, 1991.
Rule 20a-2	§ 270.20a-2 ..	3235-0158	Do.
Rule 20a-3	§ 270.20a-3 ..	3235-0158	Do.
Rule 22d-1	§ 270.22d-1 ..	3235-0310	June 30, 1991.
Rule 23c-1	§ 270.23c-1 ...	3235-0260	Feb. 28, 1989.
Rule 24f-1	§ 270.24f-1 ...	3235-0155	Feb. 28, 1991.
Rule 24f-2	§ 270.24f-2 ...	3235-0159	Feb. 28, 1991.
Rule 24f-3	§ 270.24f-3 ...	3235-0348	Apr. 30, 1990.
Rule 26a-3	§ 270.26a-3 ..	3235-0333	Apr. 30, 1990.
Rule 30a-1	§ 270.30a-1 ..	3235-0219	Feb. 28, 1991.
Rule 30b2-1.	§ 270.30b2-1 ..	3235-0220	Feb. 28, 1991.
Rule 30d-1	§ 270.30d-1 ..	3235-0025	Dec. 31, 1990.
Rule 31a-1	§ 270.31a-1 ..	3235-0178	July 31, 1990.
Rule 31a-2	§ 270.31a-2 ..	3235-0179	June 30, 1989.

Information collection requirement	17 CFR part or section where identified and described	Current OMB control No.	Expiration date
Rule 34b-1	§ 270.34b-1 ..	3235-0346	Nov. 30, 1989.
Form N-5 ..	§ 274.5	3235-0169	Feb. 28, 1989.
Form N-8A	§ 274.10	3235-0175	Jan. 31, 1991.
Form N-1 ..	§ 274.11	3235-0027	Feb. 28, 1989.
Form N-1A	§ 274.11a	3235-0307	July 31, 1991.
Form N-2 ..	§ 274.11a-1 ..	3235-0026	Dec. 31, 1990.
Form N-3 ..	§ 274.11b	3235-0316	Do.
Form N-4 ..	§ 274.11c	3235-0318	Do.
Form N-8B-2.	§ 274.12	3235-0186	Apr. 30, 1990.
Form N-7 ..	§ 274.12a	3235-0338	Apr. 30, 1990.
Form N-8B-3.	§ 274.13	3235-0166	Dec. 31, 1990.
Form N-8B-4.	§ 274.14	3234-0247	Dec. 31, 1990.
Form N-6F	§ 274.15	3235-0238	Feb. 28, 1991.
Form N-18f	§ 274.51	3235-0211	Feb. 28, 1991.
Form N-SAR.	§ 274.101	3235-0330	Sept. 30, 1990.
Form N-17d-1.	§ 274.200	3235-0229	Feb. 28, 1991.
Form N-23C-1.	§ 274.201	3235-0230	Feb. 28, 1991.
Form N-8F	§ 274.218	3235-0157	Feb. 28, 1991.
Form N-6E1-1.	§ 274.301	3235-0177	Feb. 28, 1991.
Form ET	§ 274.401	3235-0329	Oct. 31, 1989.
Form ID	§ 274.402	3235-0328	Oct. 31, 1989.
Form SE	§ 274.403	3235-0327	Oct. 31, 1989.
Rule 0-2	§ 275.0-2	3235-0240	Jan. 31, 1992.
Form N-54A.	§ 275.53	3235-0237	Feb. 28, 1991.
Form N-54C.	§ 275.54	3235-0236	Feb. 28, 1991.
Rule 203	§ 275.203-1 ..	3235-0049	June 30, 1991.
Rule 203-2	§ 275.203-2 ..	3235-0313	Jan. 31, 1992.
Rule 204-1	§ 275.204-1 ..	3235-0048	June 30, 1991.
Rule 204-2	§ 275.204-2 ..	3235-0278	Sept. 30, 1991.
Rule 204-3	§ 275.204-3 ..	3235-0047	Jan. 31, 1992.
Rule 206(3)-2.	§ 275.206(3)-2.	3235-0243	June 30, 1989.
Rule 206(4)-2.	§ 275.206(4)-2.	3235-0241	Do.
Rule 206(4)-3.	§ 275.206(4)-3.	3235-0242	Sept. 30, 1991.
Rule 206(4)-4.	§ 275.206(4)-4.	3235-0345	Do.
Form ADV ..	§ 279.1	3235-0049	June 30, 1991.
Form ADV-W.	§ 279.2	3235-0313	Jan. 31, 1992.
Form ADV-S.	§ 279.3	3235-0046	Sept. 30, 1990.
Form 4-R ..	§ 279.4	3235-0240	Do.
Form 5-R ..	§ 279.5	3235-0240	Do.
Form 6-R ..	§ 279.6	3235-0240	Do.
Form 7-R ..	§ 279.7	3235-0240	Do.

[47 FR 4982, Feb. 3, 1982, as amended at 47 FR 11401, Mar. 16, 1982; 47 FR 54766, Dec. 6, 1982; 47 FR 56834, Dec. 21, 1982; 48 FR 12347, Mar. 24, 1983; 48 FR 13160, Mar. 30, 1983; 49 FR 10927, Mar. 23, 1984; 49 FR 16765, Apr. 20, 1984; 51 FR 9769, Mar. 21, 1986; 53 FR 9764, Mar. 25, 1988; 54 FR 13057, Mar. 30, 1989]

PART 201—RULES OF PRACTICE

Subpart A [Reserved]

Securities and Exchange Commission

Pt. 201

Subpart B—Regulations Pertaining to the Equal Access to Justice Act

Sec.

- 201.31 Purpose of these rules.
- 201.32 When the Act applies.
- 201.33 Proceedings covered.
- 201.34 Eligibility of applicants.
- 201.35 Standards for awards.
- 201.36 Allowable fees and expenses.
- 201.37 Delegations of authority.
- 201.41 Contents of application.
- 201.42 Net worth exhibit.
- 201.43 Documentation of fees and expenses.
- 201.44 When an application may be filed.
- 201.51 Filing and service of documents.
- 201.52 Answer to application.
- 201.53 Reply.
- 201.54 Settlement.
- 201.55 Further proceedings.
- 201.56 Decision.
- 201.57 Commission review.
- 201.58 Judicial review.
- 201.59 Payment of award.
- 201.60 [Reserved]

Subpart C—Procedures Pertaining to the Payment of Bounties Pursuant to Subsection 21A(e) of the Securities Exchange Act of 1934

- 201.61 Scope of subpart.
- 201.62 Application required.
- 201.63 Time and place of filing.
- 201.64 Form of application and information required.
- 201.65 Identity and signature.
- 201.66 Notice to applicants.
- 201.67 Applications by legal guardians.
- 201.68 No promises of payment.

Subpart D—Rules of Practice

GENERAL RULES

- 201.100 Scope of the rules of practice.
- 201.101 Definitions.
- 201.102 Appearance and practice before the Commission.
- 201.103 Construction of rules.
- 201.104 Business hours.
- 201.110 Presiding officer.
- 201.111 Hearing officer: Authority.
- 201.112 Hearing officer: Disqualification and withdrawal.
- 201.120 Ex parte communications.
- 201.121 Separation of functions.
- 201.140 Commission orders and decisions: Signature and availability.
- 201.141 Orders and decisions: Service of orders instituting proceeding and other orders and decisions.
- 201.150 Service of papers by parties.
- 201.151 Filing of papers with the Commission: Procedure.
- 201.152 Filing of papers: Form.
- 201.153 Filing of papers: Signature requirement and effect.

- 201.154 Motions.
- 201.155 Default; motion to set aside default.
- 201.160 Time computation.
- 201.161 Extensions of time, postponements and adjournments.
- 201.180 Sanctions.
- 201.190 Confidential treatment of information in certain filings.
- 201.191 Adjudications not required to be determined on the record after notice and opportunity for hearing.
- 201.192 Rulemaking: Issuance, amendment and repeal of rules of general application.
- 201.193 Applications by barred individuals for consent to associate.

INITIATION OF PROCEEDINGS AND PREHEARING RULES

- 201.200 Initiation of proceedings.
- 201.201 Consolidation of proceedings.
- 201.202 Specification of procedures by parties in certain proceedings.
- 201.210 Parties, limited participants and amici curiae.
- 201.220 Answer to allegations.
- 201.221 Prehearing conference.
- 201.222 Prehearing submissions.
- 201.230 Enforcement and disciplinary proceedings: Availability of documents for inspection and copying.
- 201.231 Enforcement and disciplinary proceedings: Production of witness statements.
- 201.232 Subpoenas.
- 201.233 Depositions upon oral examination.
- 201.234 Depositions upon written questions.
- 201.235 Introducing prior sworn statements of witnesses into the record.
- 201.240 Settlement.
- 201.250 Motion for summary disposition.

RULES REGARDING HEARINGS

- 201.300 Hearings.
- 201.301 Hearings to be public.
- 201.302 Record of hearings.
- 201.310 Failure to appear at hearings: Default.
- 201.320 Evidence: Admissibility.
- 201.321 Evidence: Objections and offers of proof.
- 201.322 Evidence: Confidential information, protective orders.
- 201.323 Evidence: Official notice.
- 201.324 Evidence: Stipulations.
- 201.325 Evidence: Presentation under oath or affirmation.
- 201.326 Evidence: Presentation, rebuttal and cross-examination.
- 201.340 Proposed findings, conclusions and supporting briefs.
- 201.350 Record in proceedings before hearing officer; retention of documents; copies.
- 201.351 Transmittal of documents to Secretary; record index; certification.
- 201.360 Initial decision of hearing officer.

Pt. 201

**APPEAL TO THE COMMISSION AND COMMISSION
REVIEW**

- 201.400 Interlocutory review.
- 201.401 Issuance of stays.
- 201.410 Appeal of initial decisions by hearing officers.
- 201.411 Commission consideration of initial decisions by hearing officers.
- 201.420 Appeal of determinations by self-regulatory organizations.
- 201.421 Commission consideration of determinations by self-regulatory organizations.
- 201.430 Appeal of actions made pursuant to delegated authority.
- 201.431 Commission consideration of actions made pursuant to delegated authority.
- 201.450 Briefs filed with the Commission.
- 201.451 Oral argument before the Commission.
- 201.452 Additional evidence.
- 201.460 Record before the Commission.
- 201.470 Reconsideration.
- 201.490 Receipt of petitions for judicial review pursuant to 28 U.S.C. 2112(a)(1).

**RULES RELATING TO TEMPORARY ORDERS AND
SUSPENSIONS**

- 201.500 Expedited consideration of proceedings.
- 201.510 Temporary cease-and-desist orders: Application process.
- 201.511 Temporary cease-and-desist orders: Notice; procedures for hearing.
- 201.512 Temporary cease-and-desist orders: Issuance after notice and opportunity for hearing.
- 201.513 Temporary cease-and-desist orders: Issuance without prior notice and opportunity for hearing.
- 201.514 Temporary cease-and-desist orders: Judicial review; duration.
- 201.520 Suspension of registration of brokers, dealers, or other Exchange Act-registered entities: Application.
- 201.521 Suspension of registration of brokers, dealers, or other Exchange Act-registered entities: Notice and opportunity for hearing on application.
- 201.522 Suspension of registration of brokers, dealers, or other Exchange Act-registered entities: Issuance and review of order.
- 201.523 [Reserved]
- 201.524 Suspension of registrations: Duration.
- 201.530 Initial decision on permanent order: Timing for submitting proposed findings and preparation of decision.
- 201.531 Initial decision on permanent order: Effect on temporary order.
- 201.540 Appeal and Commission review of initial decision making a temporary order permanent.

17 CFR Ch. II (4-1-00 Edition)

- 201.550 Summary suspensions pursuant to Exchange Act Section 12(k)(1)(A).

**RULES REGARDING DISGORGEMENT AND
PENALTY PAYMENTS**

- 201.600 Interest on sums disgorged.
- 201.601 Prompt payment of disgorgement, interest and penalties.
- 201.610 Submission of proposed plan of disgorgement.
- 201.611 Contents of plan of disgorgement; provisions for payment.
- 201.612 Notice of proposed plan of disgorgement and opportunity for comment by non-parties.
- 201.613 Order approving, modifying or disapproving proposed plan of disgorgement.
- 201.614 Administration of plan of disgorgement.
- 201.620 Right to challenge order of disgorgement.
- 201.630 Inability to pay disgorgement, interest or penalties.

**INFORMAL PROCEDURES AND SUPPLEMENTARY
INFORMATION CONCERNING ADJUDICATORY
PROCEEDINGS**

- 201.900 Informal Procedures and Supplementary Information Concerning Adjudicatory Proceedings.

TABLE I TO SUBPART D—ADVERSARY ADJUDICATIONS CONDUCTED BY THE COMMISSION UNDER 5 U.S.C. 554

TABLE II TO SUBPART D—CROSS-REFERENCE TABLE SHOWING LOCATION OF RULES OF PRACTICE ADOPTED IN 1995 WITH FORMER RULES OF PRACTICE, RELATED RULES AND STATUTORY PROVISIONS

TABLE III TO SUBPART D—CROSS-REFERENCE TABLE SHOWING LOCATION OF FORMER RULES OF PRACTICE AND RELATED RULES WITH RULES OF PRACTICE ADOPTED IN 1995

**Subpart E—Adjustment of Civil Monetary
Penalties**

- 201.1001 Adjustment of civil monetary penalties.

TABLE 1 TO SUBPART E—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS

Subpart A [Reserved]

**Subpart B—Regulations Pertaining
to the Equal Access to Justice Act**

AUTHORITY: 15 U.S.C. 77s, 78w, 78x, 79t, 77sss, 80a-37 and 80b-11; 5 U.S.C. 504(c)(1).

SOURCE: 47 FR 610, Jan. 6, 1982, unless otherwise noted.

Securities and Exchange Commission

§ 201.34

§ 201.31 Purpose of these rules.

The Equal Access to Justice Act, 5 U.S.C. 504 (called *the Act* in this subpart B), provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (called *adversary adjudications*) before the Commission. An eligible party may receive an award when it prevails over the Commission, unless the Commission's position was substantially justified or special circumstances make an award unjust. The rules in this subpart describe the parties eligible for awards and the proceedings that are covered. They also explain how to apply for awards, and the procedures and standards that the Commission will use in ruling on those applications.

[54 FR 53051, Dec. 27, 1989]

§ 201.32 When the Act applies.

The Act applies to adversary adjudications described in § 201.33 pending on or after August 5, 1985. It also applies to any adversary adjudication commenced on or after October 1, 1984, and finally disposed of before August 5, 1985, provided that an application for fees and expenses, as described in these rules, has been filed with the Commission within 30 days after August 5, 1985. Proceedings which have been substantially concluded are not deemed pending under these rules although officially pending for purposes such as concluding remedial actions found in Commission orders or private undertakings.

[54 FR 53051, Dec. 27, 1989]

§ 201.33 Proceedings covered.

(a) The Act applies to adversary adjudications conducted by the Commission. These are on the record adjudications under 5 U.S.C. 554 in which the position of an Office or Division of the Commission as a party, not including *amicus* participation, is presented by an attorney or other representative who enters an appearance and participates in the proceeding. See appendix, 17 CFR 201.60.

(b) The fact that the Commission has not identified a type of proceeding as an adversary adjudication shall not

preclude the filing of an application by a party who believes the proceeding is covered by the Act; whether the proceeding is covered will then be an issue for resolution in proceedings on the application.

(c) If a proceeding includes both matters covered by the Act and matters specifically excluded from coverage, any award made will include only fees and expenses related to covered issues.

[47 FR 610, Jan. 6, 1982, as amended at 54 FR 53051, Dec. 27, 1989]

§ 201.34 Eligibility of applicants.

(a) To be eligible for an award of attorney fees and other expenses under the Act, the applicant must be a party to the adversary adjudication for which it seeks an award. The term *party* is defined in 5 U.S.C. 551(3). The applicant must show that it meets all conditions of eligibility set out in this subpart.

(b) The types of eligible applicants are as follows:

(1) An individual with a net worth of not more than \$2 million;

(2) The sole owner of an unincorporated business who has a net worth of not more than \$7 million, including both personal and business interests, and not more than 500 employees;

(3) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees;

(4) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with more than 500 employees; and

(5) Any other partnership, corporation, association, unit of local government, or public or private organization with a net worth of not more than \$7 million and not more than 500 employees.

(c) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the proceeding was initiated.

(d) An applicant who owns an unincorporated business will be considered as an *individual* rather than a *sole owner of an unincorporated business* if the issues on which the applicant prevails are related primarily to personal

§ 201.35

interests rather than to business interests.

(e) The employees of an applicant include all persons who regularly perform services for remuneration for the applicant, under the applicant's direction and control. Part-time employees shall be included on a proportional basis.

(f) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this subpart, unless the administrative law judge determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the administrative law judge may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(g) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

[47 FR 610, Jan. 6, 1982, as amended at 54 FR 53051, Dec. 27, 1989]

§ 201.35 Standards for awards.

(a) A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding or in a significant and discrete substantive portion of the proceeding, unless the position of the Office or Division over which the applicant has prevailed was substantially justified. The position of the Office or Division includes, in addition to the position taken by the Office or Division in the adversary adjudication, the action or failure to act by the Office or Division upon which the adversary adjudication is based. The burden of proof that an award should not be made to an eligible prevailing applicant is on counsel

17 CFR Ch. II (4-1-00 Edition)

for an Office or Division of the Commission, which must show that its position was reasonable in law and fact.

(b) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if special circumstances make the award sought unjust.

[47 FR 610, Jan. 6, 1982, as amended at 54 FR 53051, Dec. 27, 1989]

§ 201.36 Allowable fees and expenses.

(a) Subject to the limitation of paragraph (b), awards will be based on rates customarily charged, in the locale of the hearing, by persons engaged in the business of acting as attorneys, agents and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant.

(b) No award of the fee of an attorney or agent under these rules may exceed \$75.00 per hour. No award to compensate an expert witness may exceed the reasonable rate at which the Commission pays witnesses with similar expertise. However, an award may also include the reasonable expenses of the attorney, agent or witness as a separate item, if the attorney, agent or witness ordinarily charges clients separately for such expenses.

(c) In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the administrative law judge shall consider the following:

(1) If the attorney, agent or witness is in private practice, his or her customary fee for similar services, or, if an employee of the applicant the fully allocated cost of the services;

(2) The prevailing rate for similar services in the community in which the attorney, agent or witness ordinarily performs services;

(3) The time actually spent in the representation of the applicant;

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(5) Such other factors as may bear on the value of the services provided.

(d) The reasonable cost of any study, analysis, engineering report, test, project or similar matter prepared on behalf of a party may be awarded, to the extent that the charge for the service does not exceed the prevailing rate

Securities and Exchange Commission

§ 201.43

for similar services, and the study or other matter was necessary for preparation of the applicant's case.

[47 FR 610, Jan. 6, 1982, as amended at 54 FR 53051, Dec. 27, 1989]

§ 201.37 Delegations of authority.

(a) The Commission may by order delegate authority to take final action on matters pertaining to the Equal Access to Justice Act in particular cases.

(b) Unless the Commission shall order otherwise, applications for awards of fees and expenses made pursuant to this subject shall be assigned by the Chief Administrative Law Judge to an administrative law judge for determination.

[54 FR 53051, Dec. 27, 1989]

§ 201.41 Contents of application.

(a) An application for an award of fees and expenses under the Act shall identify the applicant, the proceeding for which an award is sought and contain the information required in this subpart. The application shall show that the applicant has prevailed and specify the position(s) of the opposing Office or Division in the proceeding that the applicant alleges was not substantially justified. Unless the applicant is an individual, the application shall also state the number of employees of the applicant and describe briefly the type and purpose of its organization or business.

(b) The application shall also include a statement that the applicant's net worth does not exceed \$2 million (if an individual) or \$7 million (for all other applicants, including their affiliates). However, an applicant may omit this statement if:

(1) It attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) or, in the case of a tax-exempt organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the applicant's belief that it qualifies under such section; or

(2) It states that it is a cooperative association as defined in section 15(a)

of the Agricultural Marketing Act (12 U.S.C. 1141j(a)).

(c) The application shall state the amount of fees and expenses for which an award is sought.

(d) The application may also include any other matters that the applicant wishes the Commission to consider in determining whether and in what amount an award should be made.

(e) The application shall be signed by the applicant or an authorized officer or attorney of the applicant. It shall also contain or be accompanied by a written verification under oath or under penalty of perjury that the information provided in the application is true and correct.

[47 FR 610, Jan. 6, 1982, as amended at 54 FR 53051, Dec. 27, 1989]

§ 201.42 Net worth exhibit.

(a) Each applicant, except a qualified tax-exempt organization or cooperative association, must provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates (as defined in § 201.34(f) of this part) when the proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this subpart. The administrative law judge or the Commission may require an applicant to file additional information to determine its eligibility for an award.

(b) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, an applicant that objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from disclosure may submit that exhibit in accordance with 17 CFR 201.190.

[47 FR 610, Jan. 6, 1982, as amended at 60 FR 32795, June 23, 1995]

§ 201.43 Documentation of fees and expenses.

The application shall be accompanied by full documentation of the fees and expenses, including the cost of any study, analysis, engineering report,

§ 201.44

test, project or similar matter, for which an award is sought. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. The applicant may be required to provide vouchers, receipts, or other substantiation for any fees or expenses claimed.

§ 201.44 When an application may be filed.

(a) An application may be filed whenever the applicant has prevailed in the proceeding or in a significant and discrete substantive portion of the proceeding, but in no case later than 30 days after the Commission's final disposition of the proceeding.

(b) For purposes of this rule, final disposition means the date on which a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceeding, such as a settlement or voluntary dismissal, becomes final and unappealable, both within the Commission and to the courts.

(c) If review or reconsideration is sought or taken of a decision as to which an applicant believes it has prevailed, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy.

[47 FR 610, Jan. 6, 1982, as amended at 54 FR 53052, Dec. 27, 1989]

§ 201.51 Filing and service of documents.

Any application for an award or other document related to an application shall be filed and served in the same manner as other papers in proceedings under the Commission's Rules of Practice. In addition, a copy of each application for fees and expenses shall be served on the General Counsel of the Commission.

17 CFR Ch. II (4-1-00 Edition)

§ 201.52 Answer to application.

(a) Within 30 days after service of an application, counsel representing the Office or Division of the Commission may file an answer to the application. Unless the Office or Division of the Commission counsel requests an extension of time for filing or files a statement of intent to negotiate under paragraph (b) of this section, failure to file an answer within the 30-day period may be treated as a consent to the award requested.

(b) If counsel for the Office or Division of the Commission and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional 30 days, and further extensions may be granted upon request by agency counsel and the applicant.

(c) The answer shall explain any objections to the award requested and identify the facts relied on in support of that position. If the answer is based on any alleged facts not already in the record of the proceeding, it shall include supporting affidavits or a request for further proceedings under § 201.55.

§ 201.53 Reply.

Within 15 days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, the applicant shall include with the reply either supporting affidavits or a request for further proceedings under § 201.55.

§ 201.54 Settlement.

The applicant and counsel for the Office or Division of the Commission may agree on a proposed settlement of the award before final action on the application, either in connection with a settlement of the underlying proceeding or after the underlying proceeding has been concluded, in accordance with the Commission's standard settlement procedure. See 17 CFR 201.240. If a prevailing party and counsel for the Office or Division of the Commission agree on a proposed settlement of an award before an application has been filed, the

Securities and Exchange Commission

§ 201.59

application shall be filed with the proposed settlement. If a proposed settlement provides that each side shall bear its own expenses, and the settlement is accepted, no application may be filed.

[54 FR 53052, Dec. 27, 1989, as amended at 60 FR 32795, June 23, 1995]

§ 201.55 Further proceedings.

(a) Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or counsel for the Office or Division of the Commission, or on his or her own initiative, the administrative law judge may order further proceedings, such as an informal conference, oral argument, additional written submissions or, as to issues other than substantial justification (such as the applicant's eligibility or substantiation of fees and expenses) an evidentiary hearing. The administrative law judge may order all proceedings that are otherwise available under Rule 8(d) of the Commission's Rules of Practice. Such further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application, and shall be conducted as promptly as possible. Whether or not the Commission's position was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

(b) A request for further proceedings under this section shall specifically identify the information sought or the disputed issues and shall explain why the additional proceedings are necessary to resolve the issues.

[47 FR 610, Jan. 6, 1982, as amended at 54 FR 53052, Dec. 27, 1989]

§ 201.56 Decision.

The administrative law judge shall issue an initial decision on the application promptly after completion of proceedings on the application. The decision shall include written findings and conclusions on the applicant's eligibility and status as a prevailing party, and an explanation of the reasons for any difference between the amount re-

quested and the amount awarded. The decision shall also include, if at issue, findings on whether the Commission's position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust.

§ 201.57 Commission review.

In accordance with the procedures set forth in 17 CFR 201.410 and 201.411, either the applicant or counsel for the Office or Division of the Commission may seek review of the initial decision on the fee application, or the Commission may decide to review the decision on its own initiative. If neither the applicant nor counsel for the Division or Office of the Commission seeks review and the Commission does not take review on its own initiative, the initial decision on the application shall become a final decision of the Commission 30 days after it is issued. Whether to review a decision is a matter within the discretion of the Commission. If review is taken, the Commission will issue a final decision on the application or remand the application to the administrative law judge for further proceedings.

[47 FR 610, Jan. 6, 1982, as amended at 60 FR 32795, June 23, 1995]

§ 201.58 Judicial review.

Judicial review of final Commission decisions on awards may be sought as provided in 5 U.S.C. 504(c)(2).

§ 201.59 Payment of award.

An applicant seeking payment of an award shall submit to the Comptroller of the Commission a copy of the Commission's final decision granting the award, accompanied by a sworn statement that the applicant will not seek review of the decision in the United States courts. The Commission will pay the amount awarded to the applicant as authorized by law, unless judicial review of the award has been sought by the applicant.

[54 FR 53052, Dec. 27, 1989]

§ 201.60

17 CFR Ch. II (4-1-00 Edition)

§ 201.60 [Reserved]

Subpart C—Procedures Pertaining to the Payment of Bounties Pursuant to Subsection 21A(e) of the Securities Exchange Act of 1934

AUTHORITY: 15 U.S.C. 78u-1 and 78w.

SOURCE: 54 FR 28799, July 10, 1989, unless otherwise noted.

§ 201.61 Scope of subpart.

Section 21A of the Securities Exchange Act of 1934 authorizes the courts to impose civil penalties for certain violations of that Act. Subsection 21A(e) permits the Commission to award bounties to persons who provide information that leads to the imposition of such penalties. Any such determination, including whether, to whom, or in what amount to make payments, is in the sole discretion of the Commission. This subpart sets forth procedures regarding applications for the award of bounties pursuant to subsection 21A(e). Nothing in this subpart shall be deemed to limit the discretion of the Commission with respect to determinations under subsection 21A(e) or to subject any such determination to judicial review.

§ 201.62 Application required.

No person shall be eligible for the payment of a bounty under subsection 21A(e) of the Securities Exchange Act of 1934 unless such person has filed a written application that meets the requirements of this subpart and, upon request, provides such other information as the Commission or its staff deems relevant to the application.

§ 201.63 Time and place of filing.

Each application pursuant to this subpart and each amendment thereto must be filed within one hundred and eighty days after the entry of the court order requiring the payment of the penalty that is subject to the application. Such applications and amendments shall be addressed to: Office of the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549.

§ 201.64 Form of application and information required.

Each application pursuant to this subpart shall be identified as an Application for Award of a Bounty and shall contain a detailed statement of the information provided by the applicant that the applicant believes led or may lead to the imposition of a penalty. Except as provided by Rule 65 of this subpart, each application shall state the identity and mailing address of, and be signed by, the applicant. When the application is not the means by which the applicant initially provides such information, the application shall contain: The dates and times upon which, and the means by which, the information was provided; the identity of the Commission staff members to whom the information was provided; and, if the information was provided anonymously, sufficient further information to confirm that the person filing the application is the same person who provided the information to the Commission.

§ 201.65 Identity and signature.

Applications pursuant to this subpart may omit the identity, mailing address, and signature of the applicant; *provided*, that such identity, mailing address and signature are submitted by an amendment to the application. Any such amendment must be filed within one hundred and eighty days after the entry of the court order requiring the payment of the penalty that is subject to the application.

§ 201.66 Notice to applicants.

The Commission will notify each person who files an application that meets the requirements of this subpart, at the address specified in such application, of the Commission's determination with respect to such person's application. Nothing in this subpart shall be deemed to entitle any person to any other notice from the Commission or its staff.

§ 201.67 Applications by legal guardians.

An application pursuant to this subpart may be filed by an executor, administrator, or other legal representative of a person who provides information that may be subject to a bounty

Securities and Exchange Commission

§ 201.101

payment, or by the parent or guardian of such a person if that person is a minor. Certified copies of the letters testamentary, letters of administration, or other similar evidence showing the authority of the legal representative to file the application must be annexed to the application.

§ 201.68 No promises of payment.

No person is authorized under this subpart to make any offer or promise, or otherwise to bind the Commission with respect to the payment of any bounty or the amount thereof.

Subpart D—Rules of Practice

AUTHORITY: 15 U.S.C. 77f, 77g, 77h, 77h-1, 77j, 77s, 77u, 78c(b), 78d-1, 78d-2, 78l, 78m, 78n, 78o(d), 78o-3, 78s, 78u-2, 78u-3, 78v, 78w, 79c, 79s, 79t, 79z-5a, 77sss, 77ttt, 80a-8, 80a-9, 80a-37, 80a-38, 80a-39, 80a-40, 80a-41, 80a-44, 80b-3, 80b-9, 80b-11, and 80b-12 unless otherwise noted.

SOURCE: 60 FR 32796, June 23, 1995, unless otherwise noted.

GENERAL RULES

§ 201.100 Scope of the rules of practice.

(a) Unless provided otherwise, these Rules of Practice govern proceedings before the Commission under the statutes that it administers.

(b) These rules do not apply to:

(1) Investigations, except where made specifically applicable by the Rules Relating to Investigations, part 203 of this chapter; or

(2) Actions taken by the duty officer pursuant to delegated authority under 17 CFR 200.43.

[60 FR 32796, June 23, 1995; 60 FR 46499, Sept. 7, 1995]

§ 201.101 Definitions.

(a) For purposes of these Rules of Practice, unless explicitly stated to the contrary:

(1) *Commission* means the United States Securities and Exchange Commission, or a panel of Commissioners constituting a quorum of the Commission, or a single Commissioner acting as duty officer pursuant to 17 CFR 200.43;

(2) *Counsel* means any attorney representing a party or any other person

representing a party pursuant to § 201.102(b);

(3) *Disciplinary proceeding* means an action pursuant to § 201.102(e);

(4) *Enforcement proceeding* means an action, initiated by an order instituting proceedings, held for the purpose of determining whether or not a person is about to violate, has violated, has caused a violation of, or has aided or abetted a violation of any statute or rule administered by the Commission, or whether to impose a sanction as defined in Section 551(10) of the Administrative Procedure Act, 5 U.S.C. 551(10);

(5) *Hearing officer* means an administrative law judge, a panel of Commissioners constituting less than a quorum of the Commission, an individual Commissioner, or any other person duly authorized to preside at a hearing;

(6) *Interested division* means a division or an office assigned primary responsibility by the Commission to participate in a particular proceeding;

(7) *Order instituting proceedings* means an order issued by the Commission commencing a proceeding or an order issued by the Commission to hold a hearing;

(8) *Party* means the interested division, any person named as a respondent in an order instituting proceedings, any applicant named in the caption of any order, persons entitled to notice in a stop order proceeding as set forth in § 201.200(a)(2) or any person seeking Commission review of a decision;

(9) *Proceeding* means any agency process initiated by an order instituting proceedings; or by the filing, pursuant to § 201.410, of a petition for review of an initial decision by a hearing officer; or by the filing, pursuant to § 201.420, of an application for review of a self-regulatory organization determination; or by the filing, pursuant to § 201.430, of a notice of intention to file a petition for review of a determination made pursuant to delegated authority;

(10) *Secretary* means the Secretary of the Commission; and

(11) *Temporary sanction* means a temporary cease-and-desist order or a temporary suspension of the registration of a broker, dealer, municipal securities dealer, government securities broker,

§ 201.102

17 CFR Ch. II (4-1-00 Edition)

government securities dealer, or transfer agent pending final determination whether the registration shall be revoked.

(b) [Reserved]

§ 201.102 Appearance and practice before the Commission.

A person shall not be represented before the Commission or a hearing officer except as stated in paragraphs (a) and (b) of this section or as otherwise permitted by the Commission or a hearing officer.

(a) *Representing oneself.* In any proceeding, an individual may appear on his or her own behalf.

(b) *Representing others.* In any proceeding, a person may be represented by an attorney at law admitted to practice before the Supreme Court of any State (as defined in Section 3(a)(16) of the Exchange Act, 15 U.S.C. 78c(a)(16)); a member of a partnership may represent the partnership; a bona fide officer of a corporation, trust or association may represent the corporation, trust or association; and an officer or employee of a state commission or of a department or political subdivision of a state may represent the state commission or the department or political subdivision of the state.

(c) *Former Commission employees.* Former employees of the Commission must comply with the restrictions on practice contained in the Commission's Conduct Regulation, Subpart M, 17 CFR 200.735.

(d) *Designation of address for service; notice of appearance; power of attorney; withdrawal.* (1) *Representing oneself.* When an individual first makes any filing or otherwise appears on his or her own behalf before the Commission or a hearing officer in a proceeding as defined in § 201.101(a), he or she shall file with the Commission, or otherwise state on the record, and keep current, an address at which any notice or other written communication required to be served upon him or her or furnished to him or her may be sent and a telephone number where he or she may be reached during business hours.

(2) *Representing others.* When a person first makes any filing or otherwise appears in a representative capacity be-

fore the Commission or a hearing officer in a proceeding as defined in § 201.101(a), that person shall file with the Commission, and keep current, a written notice stating the name of the proceeding; the representative's name, business address and telephone number; and the name and address of the person or persons represented.

(3) *Power of attorney.* Any individual appearing or practicing before the Commission in a representative capacity may be required to file a power of attorney with the Commission showing his or her authority to act in such capacity.

(4) *Withdrawal.* Withdrawal by any individual appearing in a representative capacity shall be permitted only by order of the Commission or the hearing officer. A motion seeking leave to withdraw shall state with specificity the reasons for such withdrawal.

(e) *Suspension and disbarment.* (1) *Generally.* The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission after notice and opportunity for hearing in the matter:

(i) Not to possess the requisite qualifications to represent others; or

(ii) To be lacking in character or integrity or to have engaged in unethical or improper professional conduct; or

(iii) To have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

(iv) With respect to persons licensed to practice as accountants, "improper professional conduct" under § 201.102(e)(1)(ii) means:

(A) Intentional or knowing conduct, including reckless conduct, that results in a violation of applicable professional standards; or (B) Either of the following two types of negligent conduct:

(1) A single instance of highly unreasonable conduct that results in a violation of applicable professional standards in circumstances in which an accountant knows, or should know, that heightened scrutiny is warranted.

(2) Repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to practice before the Commission.

(2) *Certain professionals and convicted persons.* Any attorney who has been suspended or disbarred by a court of the United States or of any State; or any person whose license to practice as an accountant, engineer, or other professional or expert has been revoked or suspended in any State; or any person who has been convicted of a felony or a misdemeanor involving moral turpitude shall be forthwith suspended from appearing or practicing before the Commission. A disbarment, suspension, revocation or conviction within the meaning of this section shall be deemed to have occurred when the disbaring, suspending, revoking or convicting agency or tribunal enters its judgment or order, including a judgment or order on a plea of *nolo contendere*, regardless of whether an appeal of such judgment or order is pending or could be taken.

(3) *Temporary suspensions.* An order of temporary suspension shall become effective upon service on the respondent. No order of temporary suspension shall be entered by the Commission pursuant to paragraph (e)(3)(i) of this section more than 90 days after the date on which the final judgment or order entered in a judicial or administrative proceeding described in paragraph (e)(3)(i)(A) or (e)(3)(i)(B) of this section has become effective, whether upon completion of review or appeal procedures or because further review or appeal procedures are no longer available.

(i) The Commission, with due regard to the public interest and without preliminary hearing, may, by order, temporarily suspend from appearing or practicing before it any attorney, accountant, engineer, or other professional or expert who has been by name:

(A) Permanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating or aiding and abetting the violation of any provision of the Fed-

eral securities laws or of the rules and regulations thereunder; or

(B) Found by any court of competent jurisdiction in an action brought by the Commission to which he or she is a party or found by the Commission in any administrative proceeding to which he or she is a party to have violated (unless the violation was found not to have been willful) or aided and abetted the violation of any provision of the Federal securities laws or of the rules and regulations thereunder.

(ii) Any person temporarily suspended from appearing and practicing before the Commission in accordance with paragraph (e)(3)(i) of this section may, within 30 days after service upon him or her of the order of temporary suspension, petition the Commission to lift the temporary suspension. If no petition has been received by the Commission within 30 days after service of the order, the suspension shall become permanent.

(iii) Within 30 days after the filing of a petition in accordance with paragraph (e)(3)(ii) of this section, the Commission shall either lift the temporary suspension, or set the matter down for hearing at a time and place designated by the Commission, or both, and, after opportunity for hearing, may censure the petitioner or disqualify the petitioner from appearing or practicing before the Commission for a period of time or permanently. In every case in which the temporary suspension has not been lifted, every hearing held and other action taken pursuant to this paragraph (e)(3) shall be expedited in accordance with § 201.500. If the hearing is held before a hearing officer, the time limits set forth in § 201.531 will govern review of the hearing officer's initial decision.

(iv) In any hearing held on a petition filed in accordance with paragraph (e)(3)(ii) of this section, the staff of the Commission shall show either that the petitioner has been enjoined as described in paragraph (e)(3)(i)(A) of this section or that the petitioner has been found to have committed or aided and abetted violations as described in paragraph (e)(3)(i)(B) of this section and that showing, without more, may be the basis for censure or disqualification. Once that showing has been made,

the burden shall be upon the petitioner to show cause why he or she should not be censured or temporarily or permanently disqualified from appearing and practicing before the Commission. In any such hearing, the petitioner may not contest any finding made against him or her or fact admitted by him or her in the judicial or administrative proceeding upon which the proceeding under this paragraph (e)(3) is predicated. A person who has consented to the entry of a permanent injunction as described in paragraph (e)(3)(i)(A) of this section without admitting the facts set forth in the complaint shall be presumed for all purposes under this paragraph (e)(3) to have been enjoined by reason of the misconduct alleged in the complaint.

(4) *Filing of prior orders.* Any person appearing or practicing before the Commission who has been the subject of an order, judgment, decree, or finding as set forth in paragraph (e)(3) of this section shall promptly file with the Secretary a copy thereof (together with any related opinion or statement of the agency or tribunal involved). Failure to file any such paper, order, judgment, decree or finding shall not impair the operation of any other provision of this section.

(5) *Reinstatement.* (i) An application for reinstatement of a person permanently suspended or disqualified under paragraph (e)(1) or (e)(3) of this section may be made at any time, and the applicant may, in the Commission's discretion, be afforded a hearing; however, the suspension or disqualification shall continue unless and until the applicant has been reinstated by the Commission for good cause shown.

(ii) Any person suspended under paragraph (e)(2) of this section shall be reinstated by the Commission, upon appropriate application, if all the grounds for application of the provisions of that paragraph are subsequently removed by a reversal of the conviction or termination of the suspension, disbarment, or revocation. An application for reinstatement on any other grounds by any person suspended under paragraph (e)(2) of this section may be filed at any time and the applicant shall be accorded an opportunity for a hearing in the matter; however, such suspension

shall continue unless and until the applicant has been reinstated by order of the Commission for good cause shown.

(6) *Other proceedings not precluded.* A proceeding brought under paragraph (e)(1), (e)(2) or (e)(3) of this section shall not preclude another proceeding brought under these same paragraphs.

(7) *Public hearings.* All hearings held under this paragraph (e) shall be public unless otherwise ordered by the Commission on its own motion or after considering the motion of a party.

(f) *Practice defined.* For the purposes of these Rules of Practice, practicing before the Commission shall include, but shall not be limited to:

(1) Transacting any business with the Commission; and

(2) The preparation of any statement, opinion or other paper by any attorney, accountant, engineer or other professional or expert, filed with the Commission in any registration statement, notification, application, report or other document with the consent of such attorney, accountant, engineer or other professional or expert.

[60 FR 32796, June 23, 1995, as amended at 63 FR 57122, Oct. 26, 1998]

§ 201.103 Construction of rules.

(a) The Rules of Practice shall be construed and administered to secure the just, speedy, and inexpensive determination of every proceeding.

(b) In any particular proceeding, to the extent that there is a conflict between these rules and a procedural requirement contained in any statute, or any rule or form adopted thereunder, the latter shall control.

(c) For purposes of these rules:

(1) Any term in the singular includes the plural, and any term in the plural includes the singular, if such use would be appropriate;

(2) Any use of a masculine, feminine, or neuter gender encompasses such other genders as would be appropriate; and

(3) Unless the context requires otherwise, counsel for a party may take any action required or permitted to be taken by such party.

§ 201.104 Business hours.

The Headquarters office of the Commission, at 450 Fifth Street, N.W.,

Securities and Exchange Commission

§ 201.120

Washington, D.C. 20549, is open each day, except Saturdays, Sundays, and Federal legal holidays, from 9 a.m. to 5:30 p.m., Eastern Standard Time or Eastern Daylight Saving Time, whichever is currently in effect in Washington, D.C. Federal legal holidays consist of New Year's Day; Birthday of Martin Luther King, Jr.; Presidents Day; Memorial Day; Independence Day; Labor Day; Columbus Day; Veterans Day; Thanksgiving Day; Christmas Day; and any other day appointed as a holiday in Washington, D.C. by the President or the Congress of the United States.

§ 201.110 Presiding officer.

All proceedings shall be presided over by the Commission or, if the Commission so orders, by a hearing officer. When the Commission designates that the hearing officer shall be an administrative law judge, the Chief Administrative Law Judge shall select, pursuant to 17 CFR 200.30-10, the administrative law judge to preside.

§ 201.111 Hearing officer: Authority.

The hearing officer shall have the authority to do all things necessary and appropriate to discharge his or her duties. No provision of these Rules of Practice shall be construed to limit the powers of the hearing officer provided by the Administrative Procedure Act, 5 U.S.C. 556, 557. The powers of the hearing officer include, but are not limited to, the following:

- (a) Administering oaths and affirmations;
- (b) Issuing subpoenas authorized by law and revoking, quashing, or modifying any such subpoena;
- (c) Receiving relevant evidence and ruling upon the admission of evidence and offers of proof;
- (d) Regulating the course of a proceeding and the conduct of the parties and their counsel;
- (e) Holding prehearing and other conferences as set forth in § 201.221 and requiring the attendance at any such conference of at least one representative of each party who has authority to negotiate concerning the resolution of issues in controversy;

(f) Recusing himself or herself upon motion made by a party or upon his or her own motion;

(g) Ordering, in his or her discretion, in a proceeding involving more than one respondent, that the interested division indicate, on the record, at least one day prior to the presentation of any evidence, each respondent against whom that evidence will be offered;

(h) Subject to any limitations set forth elsewhere in these rules, considering and ruling upon all procedural and other motions;

(i) Preparing an initial decision as provided in § 201.360;

(j) Upon notice to all parties, reopening any hearing prior to the filing of an initial decision therein, or, if no initial decision is to be filed, prior to the time fixed for the filing of final briefs with the Commission; and

(k) Informing the parties as to the availability of one or more alternative means of dispute resolution, and encouraging the use of such methods.

§ 201.112 Hearing officer: Disqualification and withdrawal.

(a) *Notice of disqualification.* At any time a hearing officer believes himself or herself to be disqualified from considering a matter, the hearing officer shall issue a notice stating that he or she is withdrawing from the matter and setting forth the reasons therefor.

(b) *Motion for withdrawal.* Any party who has a reasonable, good faith basis to believe that a hearing officer has a personal bias, or is otherwise disqualified from hearing a case, may make a motion to the hearing officer that the hearing officer withdraw. The motion shall be accompanied by an affidavit setting forth in detail the facts alleged to constitute grounds for disqualification. If the hearing officer finds himself or herself not disqualified, he or she shall so rule and shall continue to preside over the proceeding.

§ 201.120 Ex parte communications.

(a) Except to the extent required for the disposition of *ex parte* matters as authorized by law, the person presiding over an evidentiary hearing may not:

§ 201.121

17 CFR Ch. II (4–1–00 Edition)

(1) Consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) Be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for the Commission.

(b) The Commission's code of behavior regarding *ex parte* communications between persons outside the Commission and decisional employees, 17 CFR 200.110 through 200.114, governs other prohibited communications during a proceeding conducted under the Rules of Practice.

§ 201.121 Separation of functions.

Any Commission officer, employee or agent engaged in the performance of investigative or prosecutorial functions for the Commission in a proceeding as defined in § 201.101(a) may not, in that proceeding or one that is factually related, participate or advise in the decision, or in Commission review of the decision pursuant to Section 557 of the Administrative Procedure Act, 5 U.S.C. 557, except as a witness or counsel in the proceeding.

§ 201.140 Commission orders and decisions: Signature and availability.

(a) *Signature required.* All orders and decisions of the Commission shall be signed by the Secretary or any other person duly authorized by the Commission.

(b) *Availability for inspection.* Each order and decision shall be available for inspection by the public from the date of entry, unless the order or decision is nonpublic. A nonpublic order or decision shall be available for inspection by any person entitled to inspect it from the date of entry.

(c) *Date of entry of orders.* The date of entry of a Commission order shall be the date the order is signed. Such date shall be reflected in the caption of the order, or if there is no caption, in the order itself.

§ 201.141 Orders and decisions: Service of orders instituting proceeding and other orders and decisions.

(a) *Service of an order instituting proceedings.* (1) *By whom made.* The Sec-

retary, or another duly authorized officer of the Commission, shall serve a copy of an order instituting proceedings on each person named in the order as a party. The Secretary may direct an interested division to assist in making service.

(2) *How made.* (i) *To individuals.* Notice of a proceeding shall be made to an individual by delivering a copy of the order instituting proceedings to the individual or to an agent authorized by appointment or by law to receive such notice. *Delivery* means—handing a copy of the order to the individual; or leaving a copy at the individual's office with a clerk or other person in charge thereof; or leaving a copy at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein; or sending a copy of the order addressed to the individual by U.S. Postal Service certified, registered or Express Mail and obtaining a confirmation of receipt; or giving confirmed telegraphic notice.

(ii) *To corporations or entities.* Notice of a proceeding shall be made to a person other than a natural person by delivering a copy of the order instituting proceedings to an officer, managing or general agent, or any other agent authorized by appointment or by law to receive such notice, by any method specified in paragraph (a)(2)(i) of this section.

(iii) *Upon persons registered with the Commission.* In addition to any other method of service specified in paragraph (a)(2) of this section, notice may be made to a person currently registered with the Commission as a broker, dealer, municipal securities dealer, government securities broker, government securities dealer, investment adviser, investment company or transfer agent by sending a copy of the order addressed to the most recent business address shown on the person's registration form by U.S. Postal Service certified, registered or Express Mail and obtaining a confirmation of attempted delivery.

(iv) *Upon persons in a foreign country.* Notice of a proceeding to a person in a foreign country may be made by any method specified in paragraph (a)(2) of this section, or by any other method

reasonably calculated to give notice, provided that the method of service used is not prohibited by the law of the foreign country.

(v) *In stop order proceedings.* Notwithstanding any other provision of paragraph (a)(2) of this section, in proceedings pursuant to Sections 8 or 10 of the Securities Act of 1933, 15 U.S.C. 77h or 77j, or Sections 305 or 307 of the Trust Indenture Act of 1939, 15 U.S.C. 77eee or 77ggg, notice of the institution of proceedings shall be made by personal service or confirmed telegraphic notice, or a waiver obtain pursuant to paragraph (a)(4) of this section.

(3) *Certificate of service.* The Secretary shall place in the record of the proceeding a certificate of service identifying the party given notice, the method of service, the date of service, the address to which service was made and the person who made service. If service is made in person, the certificate shall state, if available, the name of the individual to whom the order was given. If service is made by U.S. Postal Service certified, registered or Express Mail, the certificate shall be accompanied by a confirmation of receipt or of attempted delivery, as required. If service is made to an agent authorized by appointment to receive service, the certificate shall be accompanied by evidence of the appointment.

(4) *Waiver of service.* In lieu of service as set forth in paragraph (a)(2) of this section, the party may be provided a copy of the order instituting proceedings by first class mail or other reliable means if a waiver of service is obtained from the party and placed in the record.

(b) *Service of orders or decisions other than an order instituting proceedings.* Written orders or decisions issued by the Commission or by a hearing officer shall be served promptly on each party pursuant to any method of service authorized under paragraph (a) of this section or § 201.150(c). Service of orders or decisions by the Commission, including those entered pursuant to delegated authority, shall be made by the Secretary or, as authorized by the Secretary, by a member of an interested division. Service of orders or decisions issued by a hearing officer shall be

made by the Secretary or the hearing officer.

§ 201.150 Service of papers by parties.

(a) *When required.* In every proceeding as defined in § 201.101(a), each paper, including each notice of appearance, written motion, brief, or other written communication, shall be served upon each party in the proceeding in accordance with the provisions of this section; provided, however, that absent an order to the contrary, no service shall be required for motions which may be heard *ex parte*.

(b) *Upon a person represented by counsel.* Whenever service is required to be made upon a person represented by counsel who has filed a notice of appearance pursuant to § 201.102, service shall be made pursuant to paragraph (c) of this section upon counsel, unless service upon the person represented is ordered by the Commission or the hearing officer.

(c) *How made.* Service shall be made by delivering a copy of the filing. *Delivery* means:

(1) Personal service—handing a copy to the person required to be served; or leaving a copy at the person's office with a clerk or other person in charge thereof, or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein;

(2) Mailing the papers through the U.S. Postal Service by first class, registered, or certified mail or Express Mail delivery addressed to the person;

(3) Sending the papers through a commercial courier service or express delivery service; or

(4) Transmitting the papers by facsimile machine where the following conditions are met:

(i) The persons serving each other by facsimile transmission have agreed to do so in a writing, signed by each party, which specifies such terms as they deem necessary with respect to facsimile machine telephone numbers to be used, hours of facsimile machine

§ 201.151

operation, the provision of non-facsimile original or copy, and any other such matters; and

(ii) Receipt of each document served by facsimile is confirmed by a manually signed receipt delivered by facsimile machine or other means agreed to by the parties.

(d) *When service is complete.* Personal service, service by U.S. Postal Service Express Mail or service by a commercial courier or express delivery service is complete upon delivery. Service by mail is complete upon mailing. Service by facsimile is complete upon confirmation of transmission by delivery of a manually signed receipt.

§ 201.151 Filing of papers with the Commission: Procedure.

(a) *When to file.* All papers required to be served by a party upon any person shall be filed with the Commission at the time of service or promptly thereafter. Papers required to be filed with the Commission must be received within the time limit, if any, for such filing.

(b) *Where to file.* Filing of papers with the Commission shall be made by filing them with the Secretary. When a proceeding is assigned to a hearing officer, a person making a filing with the Secretary shall promptly provide to the hearing officer a copy of any such filing, provided, however, that the hearing officer may direct or permit filings to be made with him or her, in which event the hearing officer shall note thereon the filing date and promptly provide the Secretary with either the original or a copy of any such filings.

(c) *To whom to direct the filing.* Unless otherwise provided, where the Commission has assigned a case to a hearing officer, all motions, objections, applications or other filings made during a proceeding prior to the filing of an initial decision therein, or, if no initial decision is to be filed, prior to the time fixed for the filing of briefs with the Commission, shall be directed to and decided by the hearing officer.

(d) *Certificate of service.* Papers filed with the Commission or a hearing officer shall be accompanied by a certificate stating the name of the person or persons served, the date of service, the method of service and the mailing ad-

17 CFR Ch. II (4-1-00 Edition)

dress or facsimile telephone number to which service was made, if not made in person. If the method of service to any party is different from the method of service to any other party or the method for filing with the Commission, the certificate shall state why a different means of service was used.

§ 201.152 Filing of papers: Form.

(a) *Specifications.* Papers filed in connection with any proceeding as defined in § 201.101(a) shall:

(1) Be on one grade of unglazed white paper measuring 8½ x 11 inches, except that, to the extent that the reduction of larger documents would render them illegible, such documents may be filed on larger paper;

(2) Be typewritten or printed in either 10- or 12-point typeface or otherwise reproduced by a process that produces permanent and plainly legible copies;

(3) Include at the head of the paper, or on a title page, the name of the Commission, the title of the proceeding, the names of the parties, the subject of the particular paper or pleading, and the file number assigned to the proceeding;

(4) Be paginated with left hand margins at least 1 inch wide, and other margins of at least 1 inch;

(5) Be double-spaced, with single-spaced footnotes and single-spaced indented quotations; and

(6) Be stapled, clipped or otherwise fastened in the upper left corner.

(b) *Signature required.* All papers must be dated and signed as provided in § 201.153.

(c) *Suitability for recordkeeping.* Documents which, in the opinion of the Commission, are not suitable for computer scanning or microfilming may be rejected.

(d) *Number of copies.* An original and three copies of all papers shall be filed.

(e) *Form of briefs.* All briefs containing more than 10 pages shall include a table of contents, an alphabetized table of cases, a table of statutes, and a table of other authorities cited, with references to the pages of the brief wherein they are cited.

(f) *Scandalous or impertinent matter.* Any scandalous or impertinent matter contained in any brief or pleading or in

connection with any oral presentation in a proceeding may be stricken on order of the Commission or the hearing officer.

§ 201.153 Filing of papers: Signature requirement and effect.

(a) *General requirements.* Following the issuance of an order instituting proceedings, every filing of a party represented by counsel shall be signed by at least one counsel of record in his or her name and shall state that counsel's business address and telephone number. A party who acts as his or her own counsel shall sign his or her individual name and state his or her address and telephone number on every filing.

(b) *Effect of signature.* (1) The signature of a counsel or party shall constitute a certification that:

(i) the person signing the filing has read the filing;

(ii) to the best of his or her knowledge, information, and belief, formed after reasonable inquiry, the filing is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and

(iii) the filing is not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of adjudication.

(2) If a filing is not signed, the hearing officer or the Commission shall strike the filing, unless it is signed promptly after the omission is called to the attention of the person making the filing.

§ 201.154 Motions.

(a) *Generally.* Unless made during a hearing or conference, a motion shall be in writing, shall state with particularity the grounds therefor, shall set forth the relief or order sought, and shall be accompanied by a written brief of the points and authorities relied upon. All written motions shall be served in accordance with § 201.150, be filed in accordance with § 201.151, meet the requirements of § 201.152, and be signed in accordance with § 201.153. The Commission or the hearing officer may order that an oral motion be submitted in writing. Unless otherwise ordered by the Commission or the hearing officer, if a motion is properly made to the

Commission concerning a proceeding to which a hearing officer is assigned, the proceeding before the hearing officer shall continue pending the determination of the motion by the Commission. No oral argument shall be heard on any motion unless the Commission or the hearing officer otherwise directs.

(b) *Opposing and reply briefs.* Except as provided in § 201.401, briefs in opposition to a motion shall be filed within five days after service of the motion. Reply briefs shall be filed within three days after service of the opposition.

(c) *Length limitation.* A brief in support of or opposition to a motion shall not exceed 10 pages, exclusive of pages containing any table of contents, table of authorities, and/or addendum. Requests for leave to file briefs in excess of 10 pages are disfavored.

§ 201.155 Default; motion to set aside default.

(a) A party to a proceeding may be deemed to be in default and the Commission or the hearing officer may determine the proceeding against that party upon consideration of the record, including the order instituting proceedings, the allegations of which may be deemed to be true, if that party fails:

(1) To appear, in person or through a representative, at a hearing or conference of which that party has been notified;

(2) To answer, to respond to a dispositive motion within the time provided, or otherwise to defend the proceeding; or

(3) To cure a deficient filing within the time specified by the commission or the hearing officer pursuant to § 201.180(b).

(b) A motion to set aside a default shall be made within a reasonable time, state the reasons for the failure to appear or defend, and specify the nature of the proposed defense in the proceeding. In order to prevent injustice and on such conditions as may be appropriate, the hearing officer, at any time prior to the filing of the initial decision, or the Commission, at any time, may for good cause shown set aside a default.

§ 201.160 Time computation.

(a) *Computation.* In computing any period of time prescribed in or allowed by these Rules of Practice or by order of the Commission, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, Sunday, or Federal legal holiday (as defined in § 201.104), in which event the period runs until the end of the next day that is not a Saturday, Sunday, or Federal legal holiday. Intermediate Saturdays, Sundays, and Federal legal holidays shall be excluded from the computation when the period of time prescribed or allowed is seven days or less, not including any additional time allowed for service by mail in paragraph (b) of this section. If on the day a filing is to be made, weather or other conditions have caused the Secretary's office or other designated filing location to close, the filing deadline shall be extended to the end of the next day that is neither a Saturday, a Sunday, nor a Federal legal holiday.

(b) *Additional time for service by mail.* If service is made by mail, three days shall be added to the prescribed period for response.

§ 201.161 Extensions of time, postponements and adjournments.

(a) *Availability.* Except as otherwise provided by law, the Commission, at any time, or the hearing officer, at any time prior to the filing of his or her initial decision or, if no initial decision is to be filed, at any time prior to the closing of the record, may, for good cause shown, extend or shorten any time limits prescribed by these Rules of Practice for the filing of any papers and may, consistent with paragraph (b) of this section, postpone or adjourn any hearing.

(b) *Limitations on postponements, adjournments and extensions.* A hearing shall begin at the time and place ordered, provided that, within the limits provided by statute, the Commission or the hearing officer may for good cause shown postpone the commencement of the hearing or adjourn a convened hearing for a reasonable period of time or change the place of hearing.

(1) *Additional considerations.* In considering a motion for postponement of the start of a hearing, adjournment once a hearing has begun, or extensions of time for filing papers, the hearing officer or the Commission shall consider, in addition to any other factors:

(i) The length of the proceeding to date;

(ii) The number of postponements, adjournments or extensions already granted;

(iii) The stage of the proceedings at the time of the request; and

(iv) Any other such matters as justice may require.

(2) *Time limit.* Postponements, adjournments or extensions of time for filing papers shall not exceed 21 days unless the Commission or the hearing officer states on the record or sets forth in a written order the reasons why a longer period of time is necessary.

§ 201.180 Sanctions.

(a) *Contemptuous conduct—*(1) *Subject to exclusion or suspension.* Contemptuous conduct by any person before the Commission or a hearing officer during any proceeding, including any conference, shall be grounds for the Commission or the hearing officer to:

(i) Exclude that person from such hearing or conference, or any portion thereof; and/or

(ii) Summarily suspend that person from representing others in the proceeding in which such conduct occurred for the duration, or any portion, of the proceeding.

(2) *Review procedure.* A person excluded from a hearing or conference, or a counsel summarily suspended from practice for the duration or any portion of a proceeding, may seek review of the exclusion or suspension by filing with the Commission, within three days of the exclusion or suspension order, a motion to vacate the order. The Commission shall consider such motion on an expedited basis as provided in § 201.500.

(3) *Adjournment.* Upon motion by a party represented by counsel subject to an order of exclusion or suspension, an adjournment shall be granted to allow the retention of new counsel. In determining the length of an adjournment,

the Commission or hearing officer shall consider, in addition to the factors set forth in § 201.161, the availability of co-counsel for the party or of other members of a suspended counsel's firm.

(b) *Deficient filings; leave to cure deficiencies.* The Commission or the hearing officer may reject, in whole or in part, any filing that fails to comply with any requirements of these Rules of Practice or of any order issued in the proceeding in which the filing was made. Any such filings shall not be part of the record. The Commission or the hearing officer may direct a party to cure any deficiencies and to resubmit the filing within a fixed time period.

(c) *Failure to make required filing or to cure deficient filing.* The Commission or the hearing officer may enter a default pursuant to § 201.155, dismiss the case, decide the particular matter at issue against that person, or prohibit the introduction of evidence or exclude testimony concerning that matter if a person fails:

(1) To make a filing required under these Rules of Practice; or

(2) To cure a deficient filing within the time specified by the Commission or the hearing officer pursuant to paragraph (b) of this section.

§ 201.190 Confidential treatment of information in certain filings.

(a) *Application.* An application for confidential treatment pursuant to the provisions of Clause 30 of Schedule A of the Securities Act of 1933, 15 U.S.C. 77aa(30), and Rule 406 thereunder, 17 CFR 230.406; Section 24(b)(2) of the Securities Exchange Act of 1934, 15 U.S.C. 78x(b)(2), and Rule 24b-2 thereunder, 17 CFR 240.24b-2; Section 22(b) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79v(b), and Rule 104 thereunder, 17 CFR 250.104; Section 45(a) of the Investment Company Act of 1940, 15 U.S.C. 80a-44(a), and Rule 45a-1 thereunder, 17 CFR 270.45a-1; or Section 210(a) of the Investment Advisers Act of 1940, 15 U.S.C. 80b-10(a), shall be filed with the Secretary. The application shall be accompanied by a sealed copy of the materials as to which confidential treatment is sought.

(b) *Procedure for supplying additional information.* The applicant may be re-

quired to furnish in writing additional information with respect to the grounds for objection to public disclosure. Failure to supply the information so requested within 14 days from the date of receipt by the applicant of a notice of the information required shall be deemed a waiver of the objection to public disclosure of that portion of the information to which the additional information relates, unless the Commission or the hearing officer shall otherwise order for good cause shown at or before the expiration of such 14-day period.

(c) *Confidentiality of materials pending final decision.* Pending the determination of the application for confidential treatment, transcripts, non-final orders including an initial decision, if any, and other materials in connection with the application shall be placed under seal; shall be for the confidential use only of the hearing officer, the Commission, the applicant, and any other parties and counsel; and shall be made available to the public only in accordance with orders of the Commission.

(d) *Public availability of orders.* Any final order of the Commission denying or sustaining an application for confidential treatment shall be made public. Any prior findings or opinions relating to an application for confidential treatment under this section shall be made public at such time as the material as to which confidentiality was requested is made public.

§ 201.191 Adjudications not required to be determined on the record after notice and opportunity for hearing.

(a) *Scope of the rule.* This rule applies to every case of adjudication, as defined in 5 U.S.C. 551, pursuant to any statute which the Commission administers, where adjudication is not required to be determined on the record after notice and opportunity for hearing and which the Commission has not chosen to determine on the record after notice and opportunity for hearing.

(b) *Procedure.* In every case of adjudication under paragraph (a) of this section, the Commission shall give prompt notice of any adverse action or final disposition to any person who has requested the Commission to make (or

not to make) any such adjudication, and furnish to any such person a written statement of reasons therefor. Additional procedures may be specified in rules relating to specific types of such adjudications. Where any such rule provides for the publication of a Commission order, notice of the action or disposition shall be deemed to be given by such publication.

(c) *Contents of the record.* If the Commission provides notice and opportunity for the submission of written comments by parties to the adjudication or, as the case may be, by other interested persons, written comments received on or before the closing date for comments, unless accorded confidential treatment pursuant to statute or rule of the Commission, become a part of the record of the adjudication. The Commission, in its discretion, may accept and include in the record written comments filed with the Commission after the closing date.

§ 201.192 Rulemaking: Issuance, amendment and repeal of rules of general application.

(a) *By petition.* Any person desiring the issuance, amendment or repeal of a rule of general application may file a petition therefor with the Secretary. Such petition shall include a statement setting forth the text or the substance of any proposed rule or amendment desired or specifying the rule the repeal of which is desired, and stating the nature of his or her interest and his or her reasons for seeking the issuance, amendment or repeal of the rule. The Secretary shall acknowledge, in writing, receipt of the petition and refer it to the appropriate division or office for consideration and recommendation. Such recommendations shall be transmitted with the petition to the Commission for such action as the Commission deems appropriate. The Secretary shall notify the petitioner of the action taken by the Commission.

(b) *Notice of proposed issuance, amendment or repeal of rules.* Except where the Commission finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, whenever the Commission proposes to issue, amend, or repeal any rule or regulation of general application other

than an interpretive rule; general statement of policy; or rule of agency organization, procedure, or practice; or any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts, there shall first be published in the FEDERAL REGISTER a notice of the proposed action. Such notice shall include:

(1) A statement of the time, place, and nature of the rulemaking proceeding, with particular reference to the manner in which interested persons shall be afforded the opportunity to participate in such proceeding;

(2) Reference to the authority under which the rule is proposed; and

(3) The terms or substance of the proposed rule or a description of the subjects and issues involved.

§ 201.193 Applications by barred individuals for consent to associate.

PRELIMINARY NOTE

This rule governs applications to the Commission by certain persons, barred by Commission order from association with brokers, dealers, municipal securities dealers, government securities brokers, government securities dealers, investment advisers, investment companies or transfer agents, for consent to become so associated. Applications made pursuant to this section must show that the proposed association would be consistent with the public interest. In addition to the information specifically required by the rule, applications should be supplemented, where appropriate, by written statements of individuals (other than the applicant) who are competent to attest to the applicant's character, employment performance, and other relevant information. Intentional misstatements or omissions of fact may constitute criminal violations of 18 U.S.C. 1001 *et seq.* and other provisions of law.

The nature of the supervision that an applicant will receive or exercise as an associated person with a registered entity is an important matter bearing upon the public interest. In meeting the burden of showing that the proposed association is consistent with the public interest, the application and supporting documentation must demonstrate that the proposed supervision, procedures, or terms and conditions of employment are reasonably designed to prevent a recurrence of the conduct that led to imposition of the bar. As an associated person, the applicant will be limited to association in a specified capacity with a particular registered entity and may also be subject to specific terms and conditions.

Normally, the applicant's burden of demonstrating that the proposed association is consistent with the public interest will be difficult to meet where the applicant is to be supervised by, or is to supervise, another barred individual. In addition, where an applicant wishes to become the sole proprietor of a registered entity and thus is seeking Commission consent notwithstanding an absence of supervision, the applicant's burden will be difficult to meet.

In addition to the factors set forth in paragraph (d) of this section, the Commission will consider the nature of the findings that resulted in the bar when making its determination as to whether the proposed association is consistent with the public interest. In this regard, attention is directed to Rule 5(e) of the Commission's Rules on Informal and Other Procedures, 17 CFR 202.5(e). Among other things, Rule 5(e) sets forth the Commission's policy "not to permit a * * * respondent [in an administrative proceeding] to consent to * * * [an] order that imposes a sanction while denying the allegations in the * * * order for proceedings." Consistent with the rationale underlying that policy, and in order to avoid the appearance that an application made pursuant to this section was granted on the basis of such denial, the Commission will not consider any application that attempts to reargue or collaterally attack the findings that resulted in the Commission's bar order.

(a) *Scope of rule.* Applications for Commission consent to associate, or to change the terms and conditions of association, with a registered broker, dealer, municipal securities dealer, government securities broker, government securities dealer, investment adviser, investment company or transfer agent may be made pursuant to this section where a Commission order bars the individual from association with a registered entity and:

(1) Such barred individual seeks to become associated with an entity that is not a member of a self-regulatory organization; or

(2) The order contains a proviso that application may be made to the Commission after a specified period of time.

(b) *Form of application.* Each application shall be supported by an affidavit, manually signed by the applicant, that addresses the factors set forth in paragraph (d) of this section. One original and three copies of the application shall be filed pursuant to §§ 201.151, 201.152 and 201.153. Each application shall include as exhibits:

(1) A copy of the Commission order imposing the bar;

(2) An undertaking by the applicant to notify immediately the Commission in writing if any information submitted in support of the application becomes materially false or misleading while the application is pending;

(3) The following forms, as appropriate:

(i) A copy of a completed Form U-4, where the applicant's proposed association is with a broker-dealer or municipal securities dealer;

(ii) A copy of a completed Form MSD-4, where the applicant's proposed association is with a bank municipal securities dealer;

(iii) The information required by Form ADV, 17 CFR 279.1, with respect to the applicant, where the applicant's proposed association is with an investment adviser;

(iv) The information required by Form TA-1, 17 CFR 249b.100, with respect to the applicant, where the applicant's proposed association is with a transfer agent; and

(4) A written statement by the proposed employer that describes:

(i) The terms and conditions of employment and supervision to be exercised over such applicant and, where applicable, by such applicant;

(ii) The qualifications, experience, and disciplinary records of the proposed supervisor(s) of the applicant;

(iii) The compliance and disciplinary history, during the two years preceding the filing of the application, of the office in which the applicant will be employed; and

(iv) The names of any other associated persons in the same office who have previously been barred by the Commission, and whether they are to be supervised by the applicant.

(c) *Required showing.* The applicant shall make a showing satisfactory to the Commission that the proposed association would be consistent with the public interest.

(d) *Factors to be addressed.* The affidavit required by paragraph (b) of this section shall address each of the following:

(1) The time period since the imposition of the bar;

§ 201.200

17 CFR Ch. II (4-1-00 Edition)

(2) Any restitution or similar action taken by the applicant to recompense any person injured by the misconduct that resulted in the bar;

(3) The applicant's compliance with the order imposing the bar;

(4) The applicant's employment during the period subsequent to imposition of the bar;

(5) The capacity or position in which the applicant proposes to be associated;

(6) The manner and extent of supervision to be exercised over such applicant and, where applicable, by such applicant;

(7) Any relevant courses, seminars, examinations or other actions completed by the applicant subsequent to imposition of the bar to prepare for his or her return to the securities business; and

(8) Any other information material to the application.

(e) *Notification to applicant and written statement.* In the event an adverse recommendation is proposed by the staff with respect to an application made pursuant to this section, the applicant shall be so advised and provided with a written statement of the reasons for such recommendation. The applicant shall then have 30 days to submit a written statement in response.

(f) *Concurrent applications.* The Commission will not consider any application submitted pursuant to this section if any other application for consent to associate concerning the same applicant is pending before any self-regulatory organization.

INITIATION OF PROCEEDINGS AND PREHEARING RULES

§ 201.200 Initiation of proceedings.

(a) *Order instituting proceedings: Notice and opportunity for hearing.* (1) *Generally.* Whenever an order instituting proceedings is issued by the Commission, appropriate notice thereof shall be given to each party to the proceeding by the Secretary or another duly designated officer of the Commission. Each party shall be given notice of any hearing within a time reasonable in light of the circumstances, in advance of the hearing; provided, however, no prior notice need be given to a respondent if the Commission has au-

thorized the Division of Enforcement to seek a temporary sanction *ex parte*.

(2) *Stop order proceedings: Additional persons entitled to notice.* Any notice of a proceeding relating to the issuance of a stop order suspending the effectiveness of a registration statement pursuant to Section 8(d) of the Securities Act of 1933, 15 U.S.C. 77h(d), shall be sent to or served on the issuer; or, in the case of a foreign government or political subdivision thereof, sent to or served on the underwriter; or, in the case of a foreign or territorial person, sent to or served on its duly authorized representative in the United States named in the registration statement, properly directed in the case of telegraphic notice to the address given in such statement. In addition, if such proceeding is commenced within 90 days after the registration statement has become effective, notice of the proceeding shall be given to the agent for service named on the facing sheet of the registration statement and to each other person designated on the facing sheet of the registration statement as a person to whom copies of communications to such agent are to be sent.

(b) *Content of order.* The order instituting proceedings shall:

(1) State the nature of any hearing;

(2) State the legal authority and jurisdiction under which the hearing is to be held;

(3) Contain a short and plain statement of the matters of fact and law to be considered and determined, unless the order directs an answer pursuant to § 201.220 in which case the order shall set forth the factual and legal basis alleged therefor in such detail as will permit a specific response thereto; and

(4) State the nature of any relief or action sought or taken.

(c) *Time and place of hearing.* The time and place for any hearing shall be fixed with due regard for the public interest and the convenience and necessity of the parties, other participants, or their representatives.

(d) *Amendment to order instituting proceedings.* (1) *By the Commission.* Upon motion by a party, the Commission may, at any time, amend an order instituting proceedings to include new matters of fact or law.

(2) *By the hearing officer.* Upon motion by a party, the hearing officer may, at any time prior to the filing of an initial decision or, if no initial decision is to be filed, prior to the time fixed for the filing of final briefs with the Commission, amend an order instituting proceedings to include new matters of fact or law that are within the scope of the original order instituting proceedings.

(e) *Publication of notice of public hearings.* Unless otherwise ordered by the Commission, notice of any public hearing shall be given general circulation by release to the public, by publication in the *SEC News Digest* and, where directed, by publication in the FEDERAL REGISTER.

§ 201.201 Consolidation of proceedings.

By order of the Commission or a hearing officer, proceedings involving a common question of law or fact may be consolidated for hearing of any or all the matters at issue in such proceedings. The Commission or the hearing officer may make such orders concerning the conduct of such proceedings as it deems appropriate to avoid unnecessary cost or delay. Consolidation shall not prejudice any rights under these Rules of Practice and shall not affect the right of any party to raise issues that could have been raised if consolidation had not occurred. For purposes of this section, no distinction is made between joinder and consolidation of proceedings.

§ 201.202 Specification of procedures by parties in certain proceedings.

(a) *Motion to specify procedures.* In any proceeding other than an enforcement or disciplinary proceeding or a proceeding to review a determination by a self-regulatory organization pursuant to §§ 201.420 and 201.421, a party may, at any time up to 20 days prior to the start of a hearing, make a motion to specify the procedures necessary or appropriate for the proceeding, with particular reference to:

(1) Whether there should be an initial decision by a hearing officer;

(2) Whether any interested division of the Commission may assist in the preparation of the Commission's decision; and

(3) Whether there should be a 30-day waiting period between the issuance of the Commission's order and the date it is to become effective.

(b) *Objections; effect of failure to object.* Any other party may object to the procedures so specified, and such party may specify such additional procedures as it considers necessary or appropriate. In the absence of such objection or such specification of additional procedures, such other party may be deemed to have waived objection to the specified procedures.

(c) *Approval required.* Any proposal pursuant to paragraph (a) of this section, even if not objected to by any party, shall be subject to the written approval of the hearing officer.

(d) *Procedure upon agreement to waive an initial decision.* If an initial decision is waived pursuant to paragraph (a) of this section, the hearing officer shall notify the Secretary and, unless the Commission directs otherwise within 14 days, no initial decision shall be issued.

§ 201.210 Parties, limited participants and amici curiae.

(a) *Parties in an enforcement or disciplinary proceeding or a proceeding to review a self-regulatory organization determination—*(1) *Generally.* No person shall be granted leave to become a party or non-party participant on a limited basis in an enforcement or disciplinary proceeding or a proceeding to review a determination by a self-regulatory organization pursuant to §§ 201.420 and 201.421, except as authorized by paragraph (c) of this section.

(2) *Disgorgement proceedings.* In an enforcement proceeding, a person may state his or her views with respect to a proposed plan of disgorgement or file a proof of claim pursuant to § 201.612.

(b) *Intervention as a party.* (1) *Generally.* In any proceeding, other than an enforcement proceeding, a disciplinary proceeding or a proceeding to review a self-regulatory organization determination, any person may seek leave to intervene as a party by filing a motion setting forth the person's interest in the proceeding. No person, however, shall be admitted as a party to a proceeding by intervention unless it is determined that leave to participate pursuant to paragraph (c) of this section

would be inadequate for the protection of his or her interests.

(i) In a proceeding under the Public Utility Holding Company Act of 1935, any representative of interested consumers or security holders, or any other person whose participation in the proceeding may be in the public interest or for the protection of investors or consumers, may be admitted as a party upon the filing of a written motion setting forth the person's interest in the proceeding.

(ii) In a proceeding under the Investment Company Act of 1940, any representative of interested security holders, or any other person whose participation in the proceeding may be in the public interest or for the protection of investors, may be admitted as a party upon the filing of a written motion setting forth the person's interest in the proceeding.

(2) *Intervention as of right.* (i) In proceedings under the Public Utility Holding Company Act of 1935, any interested representative, agency, authority or instrumentality of the United States or any interested State, State commission, municipality or other political subdivision of a state shall be admitted as a party to any proceeding upon the filing of a written motion requesting leave to be admitted.

(ii) In proceedings under the Investment Company Act of 1940, any interested State or State agency shall be admitted as a party to any proceeding upon the filing of a written motion requesting leave to be admitted.

(c) *Leave to participate on a limited basis.* In any proceeding, other than an enforcement proceeding, a disciplinary proceeding or a proceeding to review a self-regulatory organization determination, any person may seek leave to participate on a limited basis as a non-party participant as to any matter affecting the person's interests. In any enforcement proceeding or disciplinary proceeding, an authorized representative of the United States Department of Justice, an authorized representative of a United States Attorney, or an authorized representative of any criminal prosecutorial authority of any State or any other political subdivision of a State may seek leave to participate on a limited basis as a non-party

participant as provided in paragraph (c)(3) of this section.

(1) *Procedure.* Motions for leave to participate shall be in writing, shall set forth the nature and extent of the movant's interest in the proceeding, and, except where good cause for late filing is shown, shall be filed not later than 20 days prior to the date fixed for the commencement of the hearing. Leave to participate pursuant to this paragraph (c) may include such rights of a party as the hearing officer may deem appropriate. Persons granted leave to participate shall be served in accordance with § 201.150; provided, however, that a party to the proceeding may move that the extent of notice of filings or other papers to be provided to persons granted leave to participate be limited, or may move that the persons granted leave to participate bear the cost of being provided copies of any or all filings or other papers. Persons granted leave to participate shall be bound, except as may be otherwise determined by the hearing officer, by any stipulation between the parties to the proceeding with respect to procedure, including submission of evidence, substitution of exhibits, corrections of the record, the time within which briefs or exceptions may be filed or proposed findings and conclusions may be submitted, the filing of initial decisions, the procedure to be followed in the preparation of decisions and the effective date of the Commission's order in the case. Where the filing of briefs or exceptions or the submission of proposed findings and conclusions are waived by the parties to the proceedings, a person granted leave to participate pursuant to this paragraph (c) shall not be permitted to file a brief or exceptions or submit proposed findings and conclusions except by leave of the Commission or of the hearing officer.

(2) *Certain persons entitled to leave to participate.* The hearing officer is directed to grant leave to participate under this paragraph (c) to any person to whom it is proposed to issue any security in exchange for one or more bona fide outstanding securities, claims or property interests, or partly in such exchange and partly for cash, where the Commission is authorized to approve the terms and conditions of

such issuance and exchange after a hearing upon the fairness of such terms and conditions.

(3) *Leave to participate in certain Commission proceedings by a representative of the United States Department of Justice, a United States Attorney's Office, or a criminal prosecutorial authority of any State or any other political subdivision of a State.* The Commission or the hearing officer may grant leave to participate on a limited basis to an authorized representative of the United States Department of Justice, an authorized representative of a United States Attorney, or an authorized representative of any criminal prosecutorial authority of any State or any other political subdivision of a State for the purpose of requesting a stay during the pendency of a criminal investigation or prosecution arising out of the same or similar facts that are at issue in the pending Commission enforcement or disciplinary proceeding. Upon a showing that such a stay is in the public interest or for the protection of investors, the motion for stay shall be favored. A stay granted under this paragraph (c)(3) may be granted for such a period and upon such conditions as the Commission or the hearing officer deems appropriate.

(d) *Amicus participation*—(1) *Availability.* An amicus brief may be filed only if:

- (i) A motion for leave to file the brief has been granted;
- (ii) The brief is accompanied by written consent of all parties;
- (iii) The brief is filed at the request of the Commission or the hearing officer; or
- (iv) The brief is presented by the United States or an officer or agency thereof, or by a State, Territory or Commonwealth.

(2) *Procedure.* An amicus brief may be filed conditionally with the motion for leave. The motion for leave shall identify the interest of the movant and shall state the reasons why a brief of an amicus curiae is desirable. Except as all parties otherwise consent, any amicus curiae shall file its brief within the time allowed the party whose position the amicus will support, unless the Commission or hearing officer, for cause shown, grants leave for a later

filing. In the event that a later filing is allowed, the order granting leave to file shall specify when an opposing party may reply to the brief. A motion of an amicus curiae to participate in oral argument will be granted only for extraordinary reasons.

(e) *Permission to state views.* Any person may make a motion seeking leave to file a memorandum or make an oral statement of his or her views. Any such communication may be included in the record; provided, however, that unless offered and admitted as evidence of the truth of the statements therein made, any assertions of fact submitted pursuant to the provisions of this paragraph (e) will be considered only to the extent that the statements therein made are otherwise supported by the record.

(f) *Modification of participation provisions.* The Commission or the hearing officer may, by order, modify the provisions of this section which would otherwise be applicable, and may impose such terms and conditions on the participation of any person in any proceeding as it may deem necessary or appropriate in the public interest.

[60 FR 32796, June 23, 1995, as amended at 63 FR 63405, Nov. 13, 1998]

201.220 Answer to allegations.

(a) *When required.* In its order instituting proceedings, the Commission may require any party to file an answer to each of the allegations contained therein. Even if not so ordered, any party in any proceeding may elect to file an answer. Any other person granted leave by the Commission or the hearing officer to participate on a limited basis in such proceedings pursuant to §201.210(c) may be required to file an answer.

(b) *When to file.* Except where a different period is provided by rule or by order, a party required to file an answer as provided in paragraph (a) of this section shall do so within 20 days after service upon the party of the order instituting proceedings. Persons granted leave to participate on a limited basis in the proceeding pursuant to §201.210(c) may file an answer within a reasonable time, as determined by the Commission or the hearing officer. If the order instituting proceedings is

amended, the Commission or the hearing officer may require that an amended answer be filed and, if such an answer is required, shall specify a date for the filing thereof.

(c) *Contents; effect of failure to deny.* Unless otherwise directed by the hearing officer or the Commission, an answer shall specifically admit, deny, or state that the party does not have, and is unable to obtain, sufficient information to admit or deny each allegation in the order instituting proceedings. When a party intends in good faith to deny only a part of an allegation, the party shall specify so much of it as is true and shall deny only the remainder. A statement of a lack of information shall have the effect of a denial. A defense of *res judicata*, statute of limitations or any other matter constituting an affirmative defense shall be asserted in the answer. Any allegation not denied shall be deemed admitted.

(d) *Motion for more definite statement.* A party may file with an answer a motion for a more definite statement of specified matters of fact or law to be considered or determined. Such motion shall state the respects in which, and the reasons why, each such matter of fact or law should be required to be made more definite. If the motion is granted, the order granting such motion shall set the periods for filing such a statement and any answer thereto.

(e) *Amendments.* A party may amend its answer at any time by written consent of each adverse party or with leave of the Commission or the hearing officer. Leave shall be freely granted when justice so requires.

(f) *Failure to file answer: default.* If a party respondent fails to file an answer required by this section within the time provided, such person may be deemed in default pursuant to §201.155(a). A party may make a motion to set aside a default pursuant to §201.155(b).

201.221 Prehearing conference.

(a) *Purposes of conference.* The purposes of a prehearing conference include, but are not limited to:

(1) Expediting the disposition of the proceeding;

(2) Establishing early and continuing control of the proceeding by the hearing officer; and

(3) Improving the quality of the hearing through more thorough preparation.

(b) *Procedure.* On his or her own motion or at the request of a party, the hearing officer may, in his or her discretion, direct counsel or any party to meet for an initial, final or other prehearing conference. Such conferences may be held with or without the hearing officer present as the hearing officer deems appropriate. Where such a conference is held outside the presence of the hearing officer, the hearing officer shall be advised promptly by the parties of any agreements reached. Such conferences also may be held with one or more persons participating by telephone or other remote means.

(c) *Subjects to be discussed.* At a prehearing conference consideration may be given and action taken with respect to any and all of the following:

(1) Simplification and clarification of the issues;

(2) Exchange of witness and exhibit lists and copies of exhibits;

(3) Stipulations, admissions of fact, and stipulations concerning the contents, authenticity, or admissibility into evidence of documents;

(4) Matters of which official notice may be taken;

(5) The schedule for exchanging prehearing motions or briefs, if any;

(6) The method of service for papers other than Commission orders;

(7) Summary disposition of any or all issues;

(8) Settlement of any or all issues;

(9) Determination of hearing dates;

(10) Amendments to the order instituting proceedings or answers thereto;

(11) Production of documents as set forth in §201.230, and prehearing production of documents in response to subpoenas *duces tecum* as set forth in §201.232;

(12) Specification of procedures as set forth in §201.202; and

(13) Such other matters as may aid in the orderly and expeditious disposition of the proceeding.

(d) *Required prehearing conference.* Except where the emergency nature of a proceeding would make a prehearing

Securities and Exchange Commission

§ 201.230

conference clearly inappropriate, at least one prehearing conference should be held.

(e) *Prehearing orders.* At or following the conclusion of any conference held pursuant to this section, the hearing officer shall enter a ruling or order which recites the agreements reached and any procedural determinations made by the hearing officer.

(f) *Failure to appear: default.* Any person who is named in an order instituting proceedings as a person against whom findings may be made or sanctions imposed and who fails to appear, in person or through a representative, at a prehearing conference of which he or she has been duly notified may be deemed in default pursuant to § 201.155(a). A party may make a motion to set aside a default pursuant to § 201.155(b).

[60 FR 32796, June 23, 1995, as amended at 63 FR 63405, Nov. 13, 1998]

§ 201.222 Prehearing submissions.

(a) *Submissions generally.* The hearing officer, on his or her own motion, or at the request of a party or other participant, may order any party, including the interested division, to furnish such information as deemed appropriate, including any or all of the following:

(1) An outline or narrative summary of its case or defense;

(2) The legal theories upon which it will rely;

(3) Copies and a list of documents that it intends to introduce at the hearing; and

(4) A list of witnesses who will testify on its behalf, including the witnesses' names, occupations, addresses and a brief summary of their expected testimony.

(b) *Expert witnesses.* Each party who intends to call an expert witness shall submit, in addition to the information required by paragraph (a)(4) of this section, a statement of the expert's qualifications, a listing of other proceedings in which the expert has given expert testimony, and a list of publications authored or co-authored by the expert.

§ 201.230 Enforcement and disciplinary proceedings: Availability of documents for inspection and copying.

For purposes of this section, the term *documents* shall include writings, drawings, graphs, charts, photographs, recordings and other data compilations, including data stored by computer, from which information can be obtained.

(a) *Documents to be available for inspection and copying.* (1) Unless otherwise provided by this section, or by order of the Commission or the hearing officer, the Division of Enforcement shall make available for inspection and copying by any party documents obtained by the Division prior to the institution of proceedings, in connection with the investigation leading to the Division's recommendation to institute proceedings. Such documents shall include:

(i) Each subpoena issued;

(ii) Every other written request to persons not employed by the Commission to provide documents or to be interviewed;

(iii) The documents turned over in response to any such subpoenas or other written requests;

(iv) All transcripts and transcript exhibits;

(v) Any other documents obtained from persons not employed by the Commission; and

(vi) Any final examination or inspection reports prepared by the Office of Compliance Inspections and Examinations, the Division of Market Regulation, or the Division of Investment Management.

(2) Nothing in this paragraph (a) shall limit the right of the Division to make available any other document, or shall limit the right of a respondent to seek access to or production pursuant to subpoena of any other document, or shall limit the authority of the hearing officer to order the production of any document pursuant to subpoena.

(b) *Documents that may be withheld.* (1) The Division of Enforcement may withhold a document if:

(i) The document is privileged;

(ii) The document is an internal memorandum, note or writing prepared by a Commission employee, other than an examination or inspection report as specified in paragraph (a)(1)(vi) of this section, or is otherwise attorney work product and will not be offered in evidence;

(iii) The document would disclose the identity of a confidential source; or

(iv) The hearing officer grants leave to withhold a document or category of documents as not relevant to the subject matter of the proceeding or otherwise, for good cause shown.

(2) Nothing in this paragraph (b) authorizes the Division of Enforcement in connection with an enforcement or disciplinary proceeding to withhold, contrary to the doctrine of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), documents that contain material exculpatory evidence.

(c) *Withheld document list.* The hearing officer may require the Division of Enforcement to submit for review a list of documents withheld pursuant to paragraphs (b)(1) through (b)(4) of this section or to submit any document withheld, and may determine whether any such document should be made available for inspection and copying.

(d) *Timing of inspection and copying.* Unless otherwise ordered by the Commission or the hearing officer, the Division of Enforcement shall commence making documents available to a respondent for inspection and copying pursuant to this section no later than 14 days after the respondent files an answer. In a proceeding in which a temporary cease-and-desist order is sought pursuant to § 201.510 or a temporary suspension of registration is sought pursuant to § 201.520, documents shall be made available no later than the day after service of the decision as to whether to issue a temporary cease-and-desist order or temporary suspension order.

(e) *Place of inspection and copying.* Documents subject to inspection and copying pursuant to this section shall be made available to the respondent for inspection and copying at the Commission office where they are ordinarily maintained, or at such other place as the parties, in writing, may agree. A respondent shall not be given custody

of the documents or leave to remove the documents from the Commission's offices pursuant to the requirements of this section other than by written agreement of the Division of Enforcement. Such agreement shall specify the documents subject to the agreement, the date they shall be returned and such other terms or conditions as are appropriate to provide for the safe-keeping of the documents.

(f) *Copying costs and procedures.* The respondent may obtain a photocopy of any documents made available for inspection. The respondent shall be responsible for the cost of photocopying. Unless otherwise ordered, charges for copies made by the Division of Enforcement at the request of the respondent will be at the rate charged pursuant to the fee schedule at 17 CFR 200.80e for copies. The respondent shall be given access to the documents at the Commission's offices or such other place as the parties may agree during normal business hours for copying of documents at the respondent's expense.

(g) *Issuance of investigatory subpoenas after institution of proceedings.* The Division of Enforcement shall promptly inform the hearing officer and each party if investigatory subpoenas are issued under the same investigation file number or pursuant to the same order directing private investigation ("formal order") under which the investigation leading to the institution of proceedings was conducted. The hearing officer shall order such steps as necessary and appropriate to assure that the issuance of investigatory subpoenas after the institution of proceedings is not for the purpose of obtaining evidence relevant to the proceedings and that any relevant documents that may be obtained through the use of investigatory subpoenas in a continuing investigation are made available to each respondent for inspection and copying on a timely basis.

(h) *Failure to make documents available—harmless error.* In the event that a document required to be made available to a respondent pursuant to this section is not made available by the Division of Enforcement, no rehearing or rededication of a proceeding already heard or decided shall be required, unless the respondent shall establish that

Securities and Exchange Commission

§ 201.232

the failure to make the document available was not harmless error.

[60 FR 32796, June 23, 1995; 60 FR 46499, Sept. 7, 1995]

§ 201.231 Enforcement and disciplinary proceedings: Production of witness statements.

(a) *Availability.* Any respondent in an enforcement or disciplinary proceeding may move that the Division of Enforcement produce for inspection and copying any statement of any person called or to be called as a witness by the division that pertains, or is expected to pertain, to his or her direct testimony and that would be required to be produced pursuant to the Jencks Act, 18 U.S.C. 3500. Such production shall be made at a time and place fixed by the hearing officer and shall be made available to any party, provided, however, that the production shall be made under conditions intended to preserve the items to be inspected or copied.

(b) *Failure to produce—harmless error.* In the event that a statement required to be made available for inspection and copying by a respondent is not turned over by the Division of Enforcement, no rehearing or redetermination of a proceeding already heard or decided shall be required unless the respondent establishes that the failure to turn over the statement was not harmless error.

§ 201.232 Subpoenas.

(a) *Availability; procedure.* In connection with any hearing ordered by the Commission, a party may request the issuance of subpoenas requiring the attendance and testimony of witnesses at the designated time and place of hearing, and subpoenas requiring the production of documentary or other tangible evidence returnable at any designated time or place. Unless made on the record at a hearing, requests for issuance of a subpoena shall be made in writing and served on each party pursuant to § 201.150. A person whose request for a subpoena has been denied or modified may not request that any other person issue the subpoena.

(1) *Unavailability of hearing officer.* In the event that the hearing officer assigned to a proceeding is unavailable, the party seeking issuance of the subpoena may seek its issuance from the

first available of the following persons: The Chief Administrative Law Judge, the law judge most senior in service as a law judge, the duty officer, any other member of the Commission, or any other person designated by the Commission to issue subpoenas. Requests for issuance of a subpoena made to the Commission, or any member thereof, must be submitted to the Secretary, not to an individual Commissioner.

(2) *Signing may be delegated.* A hearing officer may authorize issuance of a subpoena, and may delegate the manual signing of the subpoena to any other person authorized to issue subpoenas.

(b) *Standards for issuance.* Where it appears to the person asked to issue the subpoena that the subpoena sought may be unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may, in his or her discretion, as a condition precedent to the issuance of the subpoena, require the person seeking the subpoena to show the general relevance and reasonable scope of the testimony or other evidence sought. If after consideration of all the circumstances, the person requested to issue the subpoena determines that the subpoena or any of its terms is unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may refuse to issue the subpoena, or issue it only upon such conditions as fairness requires. In making the foregoing determination, the person issuing the subpoena may inquire of the other participants whether they will stipulate to the facts sought to be proved.

(c) *Service.* Service shall be made pursuant to the provisions of § 201.150 (b) through (d). The provisions of this paragraph (c) shall apply to the issuance of subpoenas for purposes of investigations, as required by 17 CFR 203.8, as well as hearings.

(d) *Tender of fees required.* When a subpoena compelling the attendance of a person at a hearing or deposition is issued at the instance of anyone other than an officer or agency of the United States, service is valid only if the subpoena is accompanied by a tender to the subpoenaed person of the fees for one day's attendance and mileage specified by paragraph (f) of this section.

(e) *Application to quash or modify.* (1) *Procedure.* Any person to whom a subpoena is directed or who is an owner, creator or the subject of the documents that are to be produced pursuant to a subpoena may, prior to the time specified therein for compliance, but in no event more than 15 days after the date of service of such subpoena, request that the subpoena be quashed or modified. Such request shall be made by application filed with the Secretary and served on all parties pursuant to § 201.150. The party on whose behalf the subpoena was issued may, within five days of service of the application, file an opposition to the application. If a hearing officer has been assigned to the proceeding, the application to quash shall be directed to that hearing officer for consideration, even if the subpoena was issued by another person.

(2) *Standards governing application to quash or modify.* If compliance with the subpoena would be unreasonable, oppressive or unduly burdensome, the hearing officer or the Commission shall quash or modify the subpoena, or may order return of the subpoena only upon specified conditions. These conditions may include but are not limited to a requirement that the party on whose behalf the subpoena was issued shall make reasonable compensation to the person to whom the subpoena was addressed for the cost of copying or transporting evidence to the place for return of the subpoena.

(f) *Witness fees and mileage.* Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States. Witness fees and mileage shall be paid by the party at whose instance the witnesses appear.

§ 201.233 Depositions upon oral examination.

(a) *Procedure.* Any party desiring to take the testimony of a witness by deposition shall make a written motion setting forth the reasons why such deposition should be taken including the specific reasons why the party believes

the witness will be unable to attend or testify at the hearing; the name and address of the prospective witness; the matters concerning which the prospective witness is expected to be questioned; and the proposed time and place for the taking of the deposition.

(b) *Required finding when ordering a deposition.* In the discretion of the Commission or the hearing officer, an order for deposition may be issued upon a finding that the prospective witness will likely give testimony material to the proceeding, that it is likely the prospective witness will be unable to attend or testify at the hearing because of age, sickness, infirmity, imprisonment or other disability, and that the taking of a deposition will serve the interests of justice.

(c) *Contents of order.* An order for deposition shall designate by name a deposition officer. The designated officer may be the hearing officer or any other person authorized to administer oaths by the laws of the United States or of the place where the deposition is to be held. An order for deposition also shall state:

(1) The name of the witness whose deposition is to be taken;

(2) The scope of the testimony to be taken;

(3) The time and place of the deposition;

(4) The manner of recording, preserving and filing the deposition; and

(5) The number of copies, if any, of the deposition and exhibits to be filed upon completion of the deposition.

(d) *Procedure at depositions.* A witness whose testimony is taken by deposition shall be sworn or shall affirm before any questions are put to him or her. Examination and cross-examination of deponents may proceed as permitted at a hearing. The witness being deposed may have counsel present during the deposition.

(e) *Objections to questions or evidence.* Objections to questions or evidence shall be in short form, stating the grounds of objection relied upon. Objections to questions or evidence shall be noted by the deposition officer upon the deposition, but a deposition officer other than the hearing officer shall not have the power to decide on the competency, materiality or relevance of

evidence. Failure to object to questions or evidence before the deposition officer shall not be deemed a waiver unless the ground of the objection is one that might have been obviated or removed if presented at that time.

(f) *Filing of depositions.* The questions propounded and all answers or objections shall be recorded or transcribed verbatim, and a transcript prepared by the deposition officer, or under his or her direction. The transcript shall be subscribed by the witness and certified by the deposition officer. The original deposition and exhibits shall be filed with the Secretary. A copy of the deposition shall be available to the deponent and each party for purchase at prescribed rates.

(g) *Payment.* The cost of the transcript shall be paid by the party requesting the deposition.

§ 201.234 Depositions upon written questions.

(a) *Availability.* Depositions may be taken and submitted on written questions upon motion of any party. The motion shall include the information specified in § 201.233(a). A decision on the motion shall be governed by the provisions of § 201.233(b).

(b) *Procedure.* Written questions shall be filed with the motion. Within 10 days after service of the motion and written questions, any party may file objections to such written questions and any party may file cross-questions. When a deposition is taken pursuant to this section no persons other than the witness, counsel to the witness, the deposition officer, and, if the deposition officer does not act as reporter, a reporter, shall be present at the examination of the witness. No party shall be present or represented unless otherwise permitted by order. The deposition officer shall propound the questions and cross-questions to the witness in the order submitted.

(c) *Additional requirements.* The order for deposition, filing of the deposition, form of the deposition and use of the deposition in the record shall be governed by paragraphs (c) through (g) of § 201.233, except that no cross-examination shall be made.

§ 201.235 Introducing prior sworn statements of witnesses into the record.

(a) At a hearing, any person wishing to introduce a prior, sworn statement of a witness, not a party, otherwise admissible in the proceeding, may make a motion setting forth the reasons therefor. If only part of a statement is offered in evidence, the hearing officer may require that all relevant portions of the statement be introduced. If all of a statement is offered in evidence, the hearing officer may require that portions not relevant to the proceeding be excluded. A motion to introduce a prior sworn statement may be granted if:

(1) The witness is dead;

(2) The witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the prior sworn statement;

(3) The witness is unable to attend or testify because of age, sickness, infirmity, imprisonment or other disability;

(4) The party offering the prior sworn statement has been unable to procure the attendance of the witness by subpoena; or,

(5) In the discretion of the Commission or the hearing officer, it would be desirable, in the interests of justice, to allow the prior sworn statement to be used. In making this determination, due regard shall be given to the presumption that witnesses will testify orally in an open hearing. If the parties have stipulated to accept a prior sworn statement in lieu of live testimony, consideration shall also be given to the convenience of the parties in avoiding unnecessary expense.

(b) [Reserved]

§ 201.240 Settlement.

(a) *Availability.* Any person who is notified that a proceeding may or will be instituted against him or her, or any party to a proceeding already instituted, may, at any time, propose in writing an offer of settlement.

(b) *Procedure.* An offer of settlement shall state that it is made pursuant to this section; shall recite or incorporate as a part of the offer the provisions of paragraphs (c) (4) and (5) of this section; shall be signed by the person

§ 201.250

making the offer, not by counsel; and shall be submitted to the interested division.

(c) *Consideration of offers of settlement.*

(1) Offers of settlement shall be considered by the interested division when time, the nature of the proceedings, and the public interest permit.

(2) Where a hearing officer is assigned to a proceeding, the interested division and the party submitting the offer may request that the hearing officer express his or her views regarding the appropriateness of the offer of settlement. A request for the hearing officer to express his or her views on an offer of settlement or otherwise to participate in a settlement conference constitutes a waiver by the persons making the request of any right to claim bias or prejudgment by the hearing officer based on the views expressed.

(3) The interested division shall present the offer of settlement to the Commission with its recommendation, except that, if the division's recommendation is unfavorable, the offer shall not be presented to the Commission unless the person making the offer so requests.

(4) By submitting an offer of settlement, the person making the offer waives, subject to acceptance of the offer:

(i) All hearings pursuant to the statutory provisions under which the proceeding is to be or has been instituted;

(ii) The filing of proposed findings of fact and conclusions of law;

(iii) Proceedings before, and an initial decision by, a hearing officer;

(iv) All post-hearing procedures; and

(v) Judicial review by any court.

(5) By submitting an offer of settlement the person further waives:

(i) Such provisions of the Rules of Practice or other requirements of law as may be construed to prevent any member of the Commission's staff from participating in the preparation of, or advising the Commission as to, any order, opinion, finding of fact, or conclusion of law to be entered pursuant to the offer; and

(ii) Any right to claim bias or prejudgment by the Commission based on the consideration of or discussions con-

17 CFR Ch. II (4-1-00 Edition)

cerning settlement of all or any part of the proceeding.

(6) If the Commission rejects the offer of settlement, the person making the offer shall be notified of the Commission's action and the offer of settlement shall be deemed withdrawn. The rejected offer shall not constitute a part of the record in any proceeding against the person making the offer, provided, however, that rejection of an offer of settlement does not affect the continued validity of waivers pursuant to paragraph (c)(5) of this section with respect to any discussions concerning the rejected offer of settlement.

(7) Final acceptance of any offer of settlement will occur only upon the issuance of findings and an order by the Commission.

§ 201.250 Motion for summary disposition.

(a) After a respondent's answer has been filed and, in an enforcement or a disciplinary proceeding, documents have been made available to that respondent for inspection and copying pursuant to § 201.230, the respondent, or the interested division may make a motion for summary disposition of any or all allegations of the order instituting proceedings with respect to that respondent. If the interested division has not completed presentation of its case in chief, a motion for summary disposition shall be made only with leave of the hearing officer. The facts of the pleadings of the party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by that party, by uncontested affidavits, or by facts officially noted pursuant to § 201.323.

(b) The hearing officer shall promptly grant or deny the motion for summary disposition or shall defer decision on the motion. The hearing officer may grant the motion for summary disposition if there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law. If it appears that a party, for good cause shown, cannot present by affidavit prior to hearing facts essential to justify opposition to the motion, the hearing officer shall deny or defer the

motion. A hearing officer's decision to deny leave to file a motion for summary disposition is not subject to interlocutory appeal.

(c) The motion for summary disposition, supporting memorandum of points and authorities, and any declarations, affidavits or attachments shall not exceed 35 pages in length.

RULES REGARDING HEARINGS

§ 201.300 Hearings.

Hearings for the purpose of taking evidence shall be held only upon order of the Commission. All hearings shall be conducted in a fair, impartial, expeditious and orderly manner.

§ 201.301 Hearings to be public.

All hearings, except hearings on applications for confidential treatment filed pursuant to § 201.190, hearings held to consider a motion for a protective order pursuant to § 201.322, and hearings on *ex parte* application for a temporary cease-and-desist order, shall be public unless otherwise ordered by the Commission on its own motion or the motion of a party. No hearing shall be nonpublic where all respondents request that the hearing be made public.

§ 201.302 Record of hearings.

(a) *Recordation.* Unless ordered otherwise by the hearing officer or the Commission, all hearings shall be recorded and a written transcript thereof shall be prepared.

(b) *Availability of a transcript.* Transcripts of public hearings shall be available for purchase at prescribed rates. Transcripts of nonpublic proceedings, and transcripts subject to a protective order pursuant to § 201.322, shall be available for purchase only by parties; provided, however, that any person compelled to submit data or evidence in a hearing may purchase a copy of his or her own testimony.

(c) *Transcript correction.* Prior to the filing of post-hearing briefs or proposed findings and conclusions, or within such earlier time as directed by the Commission or the hearing officer, a party or witness may make a motion to correct the transcript. Proposed corrections of the transcript may be submitted to the hearing officer by stipu-

lation pursuant to § 201.324, or by motion. Upon notice to all parties to the proceeding, the hearing officer may, by order, specify corrections to the transcript.

§ 201.310 Failure to appear at hearings: Default.

Any person named in an order instituting proceedings as a person against whom findings may be made or sanctions imposed who fails to appear at a hearing of which he or she has been duly notified may be deemed to be in default pursuant to § 201.155(a). A party may make a motion to set aside a default pursuant to § 201.155(b).

§ 201.320 Evidence: Admissibility.

The Commission or the hearing officer may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial or unduly repetitious.

§ 201.321 Evidence: Objections and offers of proof.

(a) *Objections.* Objections to the admission or exclusion of evidence must be made on the record and shall be in short form, stating the grounds relied upon. Exceptions to any ruling thereon by the hearing officer need not be noted at the time of the ruling. Such exceptions will be deemed waived on appeal to the Commission, however, unless raised:

(1) Pursuant to interlocutory review in accordance with § 201.400;

(2) In a proposed finding or conclusion filed pursuant to § 201.340; or

(3) In a petition for Commission review of an initial decision filed in accordance with § 201.410.

(b) *Offers of proof.* Whenever evidence is excluded from the record, the party offering such evidence may make an offer of proof, which shall be included in the record. Excluded material shall be retained pursuant to § 201.350(b).

§ 201.322 Evidence: Confidential information, protective orders.

(a) *Procedure.* In any proceeding as defined in § 201.101(a), a party, any person who is the owner, subject or creator of a document subject to subpoena or which may be introduced as evidence, or any witness who testifies at a hearing may file a motion requesting a

protective order to limit from disclosure to other parties or to the public documents or testimony that contain confidential information. The motion should include a general summary or extract of the documents without revealing confidential details. If the movant seeks a protective order against disclosure to other parties as well as the public, copies of the documents shall not be served on other parties. Unless the documents are unavailable, the movant shall file for *in camera* inspection a sealed copy of the documents as to which the order is sought.

(b) *Basis for issuance.* Documents and testimony introduced in a public hearing are presumed to be public. A motion for a protective order shall be granted only upon a finding that the harm resulting from disclosure would outweigh the benefits of disclosure.

(c) *Requests for additional information supporting confidentiality.* A movant under paragraph (a) of this section may be required to furnish in writing additional information with respect to the grounds for confidentiality. Failure to supply the information so requested within five days from the date of receipt by the movant of a notice of the information required shall be deemed a waiver of the objection to public disclosure of that portion of the documents to which the additional information relates, unless the Commission or the hearing officer shall otherwise order for good cause shown at or before the expiration of such five-day period.

(d) *Confidentiality of documents pending decision.* Pending a determination of a motion under this section, the documents as to which confidential treatment is sought and any other documents that would reveal the confidential information in those documents shall be maintained under seal and shall be disclosed only in accordance with orders of the Commission or the hearing officer. Any order issued in connection with a motion under this section shall be public unless the order would disclose information as to which a protective order has been granted, in which case that portion of the order that would reveal the protected information shall be nonpublic.

§ 201.323 Evidence: Official notice.

Official notice may be taken of any material fact which might be judicially noticed by a district court of the United States, any matter in the public official records of the Commission, or any matter which is peculiarly within the knowledge of the Commission as an expert body. If official notice is requested or taken of a material fact not appearing in the evidence in the record, the parties, upon timely request, shall be afforded an opportunity to establish the contrary.

§ 201.324 Evidence: Stipulations.

The parties may, by stipulation, at any stage of the proceeding agree upon any pertinent facts in the proceeding. A stipulation may be received in evidence and, when received, shall be binding on the parties to the stipulation.

§ 201.325 Evidence: Presentation under oath or affirmation.

A witness at a hearing for the purpose of taking evidence shall testify under oath or affirmation.

§ 201.326 Evidence: Presentation, rebuttal and cross-examination.

In any proceeding in which a hearing is required to be conducted on the record after opportunity for hearing in accord with 5 U.S.C. 556(a), a party is entitled to present its case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as, in the discretion of the Commission or the hearing officer, may be required for a full and true disclosure of the facts. The scope and form of evidence, rebuttal evidence, if any, and cross-examination, if any, in any other proceeding shall be determined by the Commission or the hearing officer in each proceeding.

§ 201.340 Proposed findings, conclusions and supporting briefs.

(a) *Opportunity to file.* Before an initial decision is issued, each party shall have an opportunity, reasonable in light of all the circumstances, to file in writing proposed findings and conclusions together with, or as a part of, its brief.

(b) *Procedure.* Proposed findings of fact must be supported by citations to specific portions of the record. If successive filings are directed, the proposed findings and conclusions of the party assigned to file first shall be set forth in serially numbered paragraphs, and any counter statement of proposed findings and conclusions must, in addition to any other matter, indicate those paragraphs of the proposals already filed as to which there is no dispute. A reply brief may be filed by the party assigned to file first, or, where simultaneous filings are directed, reply briefs may be filed by each party, within the period prescribed therefor by the hearing officer. No further briefs may be filed except with leave of the hearing officer.

(c) *Time for filing.* In any proceeding in which an initial decision is to be issued:

(1) At the end of each hearing, the hearing officer shall, by order, after consultation with the parties, prescribe the period within which proposed findings and conclusions and supporting briefs are to be filed. The party or parties directed to file first shall make its or their initial filing within 30 days of the end of the hearing unless the hearing officer, for good cause shown, permits a different period and sets forth in the order the reasons why the different period is necessary.

(2) The total period within which all such proposed findings and conclusions and supporting briefs and any counter statements of proposed findings and conclusions and reply briefs are to be filed shall be no longer than 90 days after the close of the hearing unless the hearing officer, for good cause shown, permits a different period and sets forth in an order the reasons why the different period is necessary.

§ 201.350 Record in proceedings before hearing officer; retention of documents; copies.

(a) *Contents of the record.* The record shall consist of:

(1) The order instituting proceedings, each notice of hearing and any amendments;

(2) Each application, motion, submission or other paper, and any amend-

ments, motions, objections, and exceptions to or regarding them;

(3) Each stipulation, transcript of testimony and document or other item admitted into evidence;

(4) Each written communication accepted by the hearing officer pursuant to § 201.210;

(5) With respect to a request to disqualify a hearing officer or to allow the hearing officer's withdrawal under § 201.112, each affidavit or transcript of testimony taken and the decision made in connection with the request;

(6) All motions, briefs and other papers filed on interlocutory appeal;

(7) All proposed findings and conclusions;

(8) Each written order issued by the hearing officer or Commission; and

(9) Any other document or item accepted into the record by the hearing officer.

(b) *Retention of documents not admitted.* Any document offered in evidence but excluded, and any document marked for identification but not offered as an exhibit, shall not be considered a part of the record. The Secretary shall retain any such documents until the later of the date upon which a Commission order ending the proceeding becomes final, or the conclusion of any judicial review of the Commission's order.

(c) *Substitution of copies.* A true copy of a document may be substituted for any document in the record or any document retained pursuant to paragraph (b) of this section.

§ 201.351 Transmittal of documents to Secretary; record index; certification.

(a) *Transmittal from hearing officer to Secretary of partial record index.* The hearing officer may, at any time, transmit to the Secretary motions, exhibits or any other original documents filed with or accepted into evidence by the hearing officer, together with an index of such documents. The hearing officer, may, by order, require the interested division or other persons to assist in promptly transporting such documents from the hearing location to the Office of the Secretary.

(b) *Preparation, certification of record index.* Promptly after the close of the

hearing, the hearing officer shall transmit to the Secretary an index of the originals of any motions, exhibits or any other documents filed with or accepted into evidence by the hearing officer that have not been previously transmitted to the Secretary, and the Secretary shall prepare a record index. Prior to issuance of an initial decision, or if no initial decision is to be prepared, within 30 days of the close of the hearing, the Secretary shall transmit the record index to the hearing officer and serve a copy of the record index on each party. Any person may file proposed corrections to the record index with the hearing officer within 15 days of service of the record index. The hearing officer shall, by order, direct whether any corrections to the record index shall be made. The Secretary shall make such corrections, if any, and issue a revised record index. If an initial decision is to be issued, the initial decision shall include a certification that the record consists of the items set forth in the record index or revised record index issued by the Secretary.

(c) *Final transmittal of record items to the Secretary.* After the close of the hearing, the hearing officer shall transmit to the Secretary originals of any motions, exhibits or any other documents filed with, or accepted into evidence by, the hearing officer, or any other portions of the record that have not already been transmitted to the Secretary. Prior to service of the initial decision by the Secretary, or if no initial decision is to be issued, within 60 days of the close of the hearing, the Secretary shall inform the hearing officer if any portions of the record are not in the Secretary's custody.

§ 201.360 Initial decision of hearing officer.

(a) *When required.* Unless the Commission directs otherwise, the hearing officer shall prepare an initial decision in any proceeding in which the Commission directs a hearing officer to preside at a hearing, provided, however, that an initial decision may be waived by the parties with the consent of the hearing officer pursuant to § 201.202.

(b) *Content.* An initial decision shall include: Findings and conclusions, and

the reasons or basis therefor, as to all the material issues of fact, law or discretion presented on the record and the appropriate order, sanction, relief, or denial thereof. The initial decision shall also state the time period, not to exceed 21 days after service of the decision, except for good cause shown, within which a petition for review of the initial decision may be filed. The reasons for any extension of time shall be stated in the initial decision. The initial decision shall also include a statement that, as provided in paragraph (d) of this section:

(1) The initial decision shall become the final decision of the Commission as to each party unless a party files a petition for review of the initial decision or the Commission determines on its own initiative to review the initial decision as to a party; and

(2) If a party timely files a petition for review or the Commission takes action to review as to a party, the initial decision shall not become final with respect to that party.

(c) *Filing, service and publication.* The hearing officer shall file the initial decision with the Secretary. The Secretary shall promptly serve the initial decision upon the parties and shall promptly publish notice of the filing thereof in the *SEC News Digest*. Thereafter, the Secretary shall publish the initial decision in the *SEC Docket*; provided, however, that in nonpublic proceedings no notice shall be published unless the Commission otherwise directs.

(d) *When final.* (1) Unless a party or an aggrieved person entitled to review files a petition for review in accordance with the time limit specified in the initial decision, or unless the Commission on its own initiative orders review pursuant to § 201.411, an initial decision shall become the final decision of the Commission.

(2) If a petition for review is timely filed by a party or an aggrieved person entitled to review, or if the Commission upon its own initiative has ordered review of a decision with respect to a party or a person aggrieved who would be entitled to review, the initial decision shall not become final as to that party or person.

(e) *Order of finality.* In the event that the initial decision becomes the final decision of the Commission with respect to a party, the Commission shall issue an order that the decision has become final as to that party. The order of finality shall state the date on which sanctions, if any, take effect. Notice of the order shall be published in the *SEC News Digest* and the *SEC Docket*.

APPEAL TO THE COMMISSION AND
COMMISSION REVIEW

§ 201.400 Interlocutory review.

(a) *Availability.* The Commission will not review a hearing officer's ruling prior to its consideration of the entire proceeding in the absence of extraordinary circumstances. The Commission may decline to consider a ruling certified by a hearing officer pursuant to paragraph (c) of this section if it determines that interlocutory review is not warranted or appropriate under the circumstances. The Commission may, at any time, on its own motion, direct that any matter be submitted to it for review.

(b) *Expedited consideration.* Interlocutory review of a hearing officer's ruling shall be expedited in every way, consistent with the Commission's other responsibilities.

(c) *Certification process.* A ruling submitted to the Commission for interlocutory review must be certified in writing by the hearing officer and shall specify the material relevant to the ruling involved. The hearing officer shall not certify a ruling unless:

(1) His or her ruling would compel testimony of Commission members, officers or employees or the production of documentary evidence in their custody; or

(2) Upon application by a party, within five days of the hearing officer's ruling, the hearing officer is of the opinion that:

(i) The ruling involves a controlling question of law as to which there is substantial ground for difference of opinion; and

(ii) An immediate review of the order may materially advance the completion of the proceeding.

(d) *Proceedings not stayed.* The filing of an application for review or the grant of review shall not stay proceedings before the hearing officer unless he or she, or the Commission, shall so order. The Commission will not consider the motion for a stay unless the motion shall have first been made to the hearing officer.

§ 201.401 Issuance of stays.

(a) *Procedure.* A request for a stay shall be made by written motion, filed pursuant to § 201.154, and served on all parties pursuant to § 201.150. The motion shall state the reasons for the relief requested and the facts relied upon, and, if the facts are subject to dispute, the motion shall be supported by affidavits or other sworn statements or copies thereof. Portions of the record relevant to the relief sought, if available to the movant, shall be filed with the motion. The Commission may issue a stay based on such motion or on its own motion.

(b) *Scope of relief.* The Commission may grant a stay in whole or in part, and may condition relief under this section upon such terms, or upon the implementation of such procedures, as it deems appropriate.

(c) *Stay of a Commission order.* A motion for a stay of a Commission order may be made by any person aggrieved thereby who would be entitled to review in a federal court of appeals. A motion seeking to stay the effectiveness of a Commission order pending judicial review may be made to the Commission at any time during which the Commission retains jurisdiction over the proceeding.

(d) *Stay of an action by a self-regulatory organization—(1) Availability.* A motion for a stay of an action by a self-regulatory organization for which the Commission is the appropriate regulatory agency, for which action review may be sought pursuant to § 201.420, may be made by any person aggrieved thereby.

(2) *Summary entry.* A stay may be entered summarily, without notice and opportunity for hearing.

(3) *Expedited consideration.* Where the action complained of has already taken effect and the motion for stay is filed within 10 days of the effectiveness of

§ 201.410

the action, or where the action complained of, will, by its terms, take effect within five days of the filing of the motion for stay, the consideration of and decision on the motion for a stay shall be expedited in every way, consistent with the Commission's other responsibilities. Where consideration will be expedited, persons opposing the motion for a stay may file a statement in opposition within two days of service of the motion unless the Commission, by written order, shall specify a different period.

§ 201.410 Appeal of initial decisions by hearing officers.

(a) *Petition for review; when available.* In any proceeding in which an initial decision is made by a hearing officer, any party, and any other person who would have been entitled to judicial review of the decision entered therein if the Commission itself had made the decision, may file a petition for review of the decision with the Commission.

(b) *Procedure.* The petition for review of an initial decision shall be filed with the Commission within such time after service of the initial decision as prescribed by the hearing officer pursuant to § 201.360(b). The petition shall set forth the specific findings and conclusions of the initial decision as to which exception is taken, together with supporting reasons for each exception. Supporting reasons may be stated in summary form. Any exception to an initial decision not stated in the petition for review, or in a previously filed proposed finding made pursuant to § 201.340, may, at the discretion of the Commission, be deemed to have been waived by the petitioner.

(c) *Financial disclosure statement requirement.* Any person who files a petition for review of an initial decision that asserts that person's inability to pay either disgorgement, interest or a penalty shall file with the opening brief a sworn financial disclosure statement containing the information specified in § 201.630(b).

(d) *Opposition to review.* A party may seek leave to file a brief in opposition to a petition for review within five days of the filing of the petition. The Commission will grant leave, or order the filing of an opposition on its own

17 CFR Ch. II (4-1-00 Edition)

motion, only if it determines that briefing will significantly aid the decisional process. A brief in opposition shall identify those issues which do not warrant consideration by the Commission and shall state succinctly the reasons therefore.

(e) *Prerequisite to judicial review.* Pursuant to Section 704 of the Administrative Procedure Act, 5 U.S.C. 704, a petition to the Commission for review of an initial decision is a prerequisite to the seeking of judicial review of a final order entered pursuant to such decision.

§ 201.411 Commission consideration of initial decisions by hearing officers.

(a) *Scope of review.* The Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, an initial decision by a hearing officer and may make any findings or conclusions that in its judgment are proper and on the basis of the record.

(b) *Standards for granting review pursuant to a petition for review—(1) Mandatory review.* After a petition for review has been filed, the Commission shall review any initial decision that:

(i) Denies any request for action pursuant to Section 8(a) or Section 8(c) of the Securities Act of 1933, 15 U.S.C. 77h(a), (c), or the first sentence of Section 12(d) of the Exchange Act, 15 U.S.C. 78l(d);

(ii) Suspends trading in a security pursuant to Section 12(k) of the Exchange Act, 15 U.S.C. 78l(k); or

(iii) Is in a case of adjudication (as defined in 5 U.S.C. 551) not required to be determined on the record after notice and opportunity for hearing (except to the extent there is involved a matter described in 5 U.S.C. 554(a) (1) through (6)).

(2) *Discretionary review.* The Commission may decline to review any other decision. In determining whether to grant review, the Commission shall consider whether the petition for review makes a reasonable showing that:

(i) A prejudicial error was committed in the conduct of the proceeding; or

(ii) The decision embodies:

(A) A finding or conclusion of material fact that is clearly erroneous; or

(B) A conclusion of law that is erroneous; or

(C) An exercise of discretion or decision of law or policy that is important and that the Commission should review.

(c) *Commission review other than pursuant to a petition for review.* The Commission may, on its own initiative, order review of any initial decision, or a portion of any initial decision, within 21 days after the end of the period established for filing a petition for review pursuant to §201.410(b) or any brief in opposition to a petition for review permitted pursuant to §201.410(d). A party who does not intend to file a petition for review, and who desires the Commission's determination whether to order review on its own initiative to be made in a shorter time, may make a motion for an expedited decision, accompanied by a written statement that the party waives its right to file a petition for review. The vote of one member of the Commission, conveyed to the Secretary, shall be sufficient to bring a matter before the Commission for review.

(d) *Limitations on matters reviewed.* Review by the Commission of an initial decision shall be limited to the issues specified in the petition for review or the issues, if any, specified in the briefing schedule order issued pursuant to §201.450(a). On notice to all parties, however, the Commission may, at any time prior to issuance of its decision, raise and determine any other matters that it deems material, with opportunity for oral or written argument thereon by the parties.

(e) *Summary affirmance.* The Commission may summarily affirm an initial decision based upon the petition for review and any response thereto, without further briefing, if it finds that no issue raised in the petition for review warrants further consideration by the Commission.

(f) *Failure to obtain a majority.* In the event a majority of participating Commissioners do not agree to a disposition on the merits, the initial decision shall be of no effect, and an order will be issued in accordance with this result.

§ 201.420 Appeal of determinations by self-regulatory organizations.

(a) *Application for review; when available.* An application for review by the Commission may be filed by any person who is aggrieved by a self-regulatory organization determination as to which a notice is required to be filed with the Commission pursuant to Section 19(d)(1) of the Exchange Act, 15 U.S.C. 78s(d)(1). Such determinations include any:

- (1) Final disciplinary sanction;
- (2) Denial or conditioning of membership or participation;
- (3) Prohibition or limitation in respect to access to services offered by that self-regulatory organization or a member thereof; or
- (4) Bar from association.

(b) *Procedure.* An application for review may be filed with the Commission pursuant to §201.151 within 30 days after notice of the determination was filed with the Commission pursuant to Section 19(d)(1) of the Exchange Act, 15 U.S.C. 78s(d)(1), and received by the aggrieved person applying for review. The application shall be served by the applicant on the self-regulatory organization. The application shall identify the determination complained of, set forth in summary form a brief statement of alleged errors in the determination and supporting reasons therefor and state an address where the applicant can be served with the record index. The application shall be accompanied by the notice of appearance required by §201.102(d).

(c) *Determination not stayed.* Filing an application for review with the Commission pursuant to paragraph (b) of this section shall not operate as a stay of the complained of determination made by the self-regulatory organization unless the Commission otherwise orders either pursuant to a motion filed in accordance with §201.401 or on its own motion.

(d) *Certification of the record; service of the index.* Fourteen days after receipt of an application for review or a Commission order for review, the self-regulatory organization shall certify and file with the Commission one copy of the record upon which the action complained of was taken, and shall file with the Commission three copies of an

§ 201.421

index to such record, and shall serve upon each party one copy of the index.

§ 201.421 Commission consideration of determinations by self-regulatory organizations.

(a) *Commission review other than pursuant to a petition for review.* The Commission may, on its own initiative, order review of any determination by a self-regulatory organization that could be subject to an application for review pursuant to § 201.420(a) within 40 days after notice thereof was filed with the Commission pursuant to Section 19(d)(1) of the Exchange Act, 15 U.S.C. 78s(d)(1).

(b) *Supplemental briefing.* The Commission may at any time prior to issuance of its decision raise or consider any matter that it deems material, whether or not raised by the parties. Notice to the parties and an opportunity for supplemental briefing with respect to issues not briefed by the parties shall be given where the Commission believes that such briefing would significantly aid the decisional process.

§ 201.430 Appeal of actions made pursuant to delegated authority.

(a) *Scope of rule.* Any person aggrieved by an action made by authority delegated in §§ 200.30-1 through 200.30-18 of this chapter may seek review of the action pursuant to paragraph (b) of this section.

(b) *Procedure—(1) Notice of intention to petition for review.* A party or any person aggrieved by an action made pursuant to delegated authority may seek Commission review of the action by filing a written notice of intention to petition for review within five days after actual notice to the party of the action or service of notice of the action pursuant to § 201.141(b), whichever is earlier. The notice shall identify the petitioner and the action complained of, and shall be accompanied by a notice of appearance pursuant to § 201.102(d).

(2) *Petition for review.* Within five days after the filing of a notice of intention to petition for review pursuant to paragraph (b)(1) of this section, the person seeking review shall file a petition for review containing a clear and concise statement of the issues to be

17 CFR Ch. II (4-1-00 Edition)

reviewed and the reasons why review is appropriate. The petition shall include exceptions to any findings of fact or conclusions of law made, together with supporting reasons for such exceptions based on appropriate citations to such record as may exist. These reasons may be stated in summary form.

(c) *Prerequisite to judicial review.* Pursuant to Section 704 of the Administrative Procedure Act, 5 U.S.C. 704, a petition to the Commission for review of an action made by authority delegated in §§ 200.30-1 through 200.30-18 of this chapter is a prerequisite to the seeking of judicial review of a final order entered pursuant to such an action.

[60 FR 32796, June 23, 1995; 60 FR 46500, Sept. 7, 1995]

§ 201.431 Commission consideration of actions made pursuant to delegated authority.

(a) *Scope of review.* The Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, any action made pursuant to authority delegated in §§ 200.30-1 through 200.30-18 of this chapter.

(b) *Standards for granting review pursuant to a petition for review—(1) Mandatory review.* After a petition for review has been filed, the Commission shall review any action that it would be required to review pursuant to § 201.411(b)(1) if the action was made as the initial decision of a hearing officer.

(2) *Discretionary review.* The Commission may decline to review any other action. In determining whether to grant review, the Commission shall consider the factors set forth in § 201.411(b)(2).

(c) *Commission review other than pursuant to a petition for review.* The Commission may, on its own initiative, order review of any action made pursuant to delegated authority at any time, provided, however, that where there are one or more parties to the matter, such review shall not be ordered more than ten days after the action. The vote of one member of the Commission, conveyed to the Secretary, shall be sufficient to bring a matter before the Commission for review.

(d) *Required items in an order for review.* In an order granting a petition

for review or directing review on the Commission's own initiative, the Commission shall set forth the time within which any party or other person may file a statement in support of or in opposition to the action made by delegated authority and shall state whether a stay shall be granted, if none is in effect, or shall be continued, if in effect pursuant to paragraph (e) of this section.

(e) *Automatic stay of delegated action.* An action made pursuant to delegated authority shall have immediate effect and be deemed the action of the Commission. Upon filing with the Commission of a notice of intention to petition for review, or upon notice to the Secretary of the vote of a Commissioner that a matter be reviewed, an action made pursuant to delegated authority shall be stayed until the Commission orders otherwise, provided, however, there shall be no automatic stay of an action:

(1) To grant a stay of action by the Commission or a self-regulatory organization as authorized by 17 CFR 200.30-14(g) (5)-(6); or

(2) To commence a subpoena enforcement proceeding as authorized by 17 CFR 200.30-4(a)(10).

(f) *Effectiveness of stay or of Commission decision to modify or reverse a delegated action.* As against any person who shall have acted in reliance upon any action at a delegated level, any stay or any modification or reversal by the Commission of such action shall be effective only from the time such person receives actual notice of such stay, modification or reversal.

[60 FR 32796, June 23, 1995; 60 FR 46500, Sept. 7, 1995]

§ 201.450 Briefs filed with the Commission.

(a) *Briefing schedule order.* Other than review ordered pursuant to § 201.431, if review of a determination is mandated by statute, rule, or judicial order or the Commission determines to grant review as a matter of discretion, the Commission shall issue a briefing schedule order directing the party or parties to file opening briefs and specifying particular issues, if any, as to which briefing should be limited or directed. Unless otherwise provided,

opening briefs shall be filed within 40 days of the date of the briefing schedule order. Opposition briefs shall be filed within 30 days after the date opening briefs are due. Reply briefs shall be filed within 14 days after the date opposition briefs are due. No briefs in addition to those specified in the briefing schedule order may be filed except with leave of the Commission. The briefing schedule order shall be issued:

(1) At the time the Commission orders review on its own initiative pursuant to §§ 201.411 or 201.421, or orders interlocutory review on its own motion pursuant to § 201.400(a); or

(2) Within 21 days, or such longer time as provided by the Commission, after:

(i) The last day permitted for filing a petition for review pursuant to § 201.410(b) or a brief in opposition to a petition for review pursuant to § 201.410(d);

(ii) Receipt by the Commission of an index to the record of a determination of a self-regulatory organization filed pursuant to § 201.420(d);

(iii) Receipt by the Commission of the mandate of a court of appeals with respect to a judicial remand; or

(iv) Certification of a ruling for interlocutory review pursuant to § 201.400(c).

(b) *Contents of briefs.* Briefs shall be confined to the particular matters at issue. Each exception to the findings or conclusions being reviewed shall be stated succinctly. Exceptions shall be supported by citation to the relevant portions of the record, including references to the specific pages relied upon, and by concise argument including citation of such statutes, decisions and other authorities as may be relevant. If the exception relates to the admission or exclusion of evidence, the substance of the evidence admitted or excluded shall be set forth in the brief, in an appendix thereto, or by citation to the record. Reply briefs shall be confined to matters in opposition briefs of other parties.

(c) *Length limitation.* Opening and opposition briefs shall not exceed 50 pages and reply briefs shall not exceed 25 pages, exclusive of pages containing

§ 201.451

the table of contents, table of authorities, and any addendum, except with leave of the Commission.

§ 201.451 Oral argument before the Commission.

(a) *Availability.* The Commission, on its own motion or the motion of a party or any other aggrieved person entitled to Commission review, may order oral argument with respect to any matter. Motions for oral argument with respect to whether to affirm all or part of an initial decision by a hearing officer shall be granted unless exceptional circumstances make oral argument impractical or inadvisable. The Commission will consider appeals, motions and other matters properly before it on the basis of the papers filed by the parties without oral argument unless the Commission determines that the presentation of facts and legal arguments in the briefs and record and the decisional process would be significantly aided by oral argument.

(b) *Procedure.* Requests for oral argument shall be made by separate motion accompanying the initial brief on the merits. The Commission shall issue an order as to whether oral argument is to be heard, and if so, the time and place therefor. The grant or denial of a motion for oral argument shall be made promptly after the filing of the last brief called for by the briefing schedule. If oral argument is granted, the time fixed for oral argument shall be changed only by written order of the Commission, for good cause shown. The order shall state at whose request the change is made and the reasons for any such change.

(c) *Time allowed.* Unless the Commission orders otherwise, not more than one half-hour per side will be allowed for oral argument. The Commission may, in its discretion, determine that several persons have a common interest, and that the interests represented will be considered a single side for purposes of allotting time for oral argument. Time will be divided equally among persons on a single side, provided, however, that by mutual agreement they may reallocate their time among themselves. A request for additional time must be made by motion

17 CFR Ch. II (4–1–00 Edition)

filed reasonably in advance of the date fixed for argument.

(d) *Participation of Commissioners.* A member of the Commission who was not present at the oral argument may participate in the decision of the proceeding, provided that the member has reviewed the transcript of such argument prior to such participation. The decision shall state whether the required review was made.

§ 201.452 Additional evidence.

Upon its own motion or the motion of a party, the Commission may allow the submission of additional evidence. A party may file a motion for leave to adduce additional evidence at any time prior to issuance of a decision by the Commission. Such motion shall show with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously. The Commission may accept or hear additional evidence, may remand the proceeding to a self-regulatory organization, or may remand or refer the proceeding to a hearing officer for the taking of additional evidence, as appropriate.

§ 201.460 Record before the Commission.

The Commission shall determine each matter on the basis of the record.

(a) Contents of the record.

(1) In proceedings for final decision before the Commission other than those reviewing a determination by a self-regulatory organization, the record shall consist of:

(i) All items part of the record below in accordance with § 201.350;

(ii) Any petitions for review, cross-petitions or oppositions; and

(iii) All briefs, motions, submissions and other papers filed on appeal or review.

(2) In a proceeding for final decision before the Commission reviewing a determination by a self-regulatory organization, the record shall consist of:

(i) The record certified pursuant to § 201.420(d) by the self-regulatory organization;

(ii) Any application for review; and

(iii) Any submissions, moving papers, and briefs filed on appeal or review.

(b) *Transmittal of record to Commission.* Within 14 days after the last date set for filing briefs or such later date as the Commission directs, the Secretary shall transmit the record to the Commission.

(c) *Review of documents not admitted.* Any document offered in evidence but excluded by the hearing officer or the Commission and any document marked for identification but not offered as an exhibit shall not be considered a part of the record before the Commission on appeal but shall be transmitted to the Commission by the Secretary if so requested by the Commission. In the event that the Commission does not request the document, the Secretary shall retain the document not admitted into the record until the later of:

(1) The date upon which the Commission's order becomes final, or

(2) The conclusion of any judicial review of that order.

§ 201.470 Reconsideration.

(a) *Scope of rule.* A party or any person aggrieved by a determination in a proceeding may file a motion for reconsideration of a final order issued by the Commission.

(b) *Procedure.* A motion for reconsideration shall be filed within 10 days after service of the order complained of on each party, or within such time as the Commission may prescribe upon motion of the person seeking reconsideration, if made within the foregoing 10-day period. The motion for reconsideration shall briefly and specifically state the matters of record alleged to have been erroneously decided, the grounds relied upon, and the relief sought. Except with permission of the Commission, a motion for reconsideration shall not exceed 15 pages. No responses to a motion for reconsideration shall be filed unless requested by the Commission.

§ 201.490 Receipt of petitions for judicial review pursuant to 28 U.S.C. 2112(a)(1).

The Commission officer and office designated pursuant to 28 U.S.C. 2112(a)(1) to receive copies of petitions for review of Commission orders from the persons instituting review in a court of appeals, are the Secretary and

the Office of the Secretary at the Commission's Headquarters. Ten copies of each petition shall be submitted. Each copy shall state on its face that it is being submitted to the Commission pursuant to 28 U.S.C. 2112 by the person or persons who filed the petition in the court of appeals.

RULES RELATING TO TEMPORARY ORDERS AND SUSPENSIONS

§ 201.500 Expedited consideration of proceedings.

Consistent with the Commission's or the hearing officer's other responsibilities, every hearing shall be held and every decision shall be rendered at the earliest possible time in connection with:

(a) An application for a temporary sanction, as defined in § 201.101(a), or a proceeding to determine whether a temporary sanction should be made permanent;

(b) A motion or application to review an order suspending temporarily the effectiveness of an exemption from registration pursuant to Regulations A, B, E or F under the Securities Act, §§ 230.258, 230.336, 230.610 or 230.656 of this chapter; or,

(c) A motion to or petition to review an order suspending temporarily the privilege of appearing before the Commission under § 201.102(e)(3), or a sanction under § 201.180(a)(1).

§ 201.510 Temporary cease-and-desist orders: Application process.

(a) *Procedure.* A request for entry of a temporary cease-and-desist order shall be made by application filed by the Division of Enforcement. The application shall set forth the statutory provision or rule that each respondent is alleged to have violated; the temporary relief sought against each respondent, including whether the respondent would be required to take action to prevent the dissipation or conversion of assets; and whether the relief is sought *ex parte*.

(b) *Accompanying documents.* The application shall be accompanied by a declaration of facts signed by a person with knowledge of the facts contained therein, a memorandum of points and authorities, a proposed order imposing

the temporary relief sought, and, unless relief is sought *ex parte*, a proposed notice of hearing and order to show cause whether the temporary relief should be imposed. If a proceeding for a permanent cease-and-desist order has not already been commenced, a proposed order instituting proceedings to determine whether a permanent cease-and-desist order should be imposed shall also be filed with the application.

(c) *With whom filed.* The application shall be filed with the Secretary or, if the Secretary is unavailable, with the duty officer. In no event shall an application be filed with an administrative law judge.

(d) *Record of proceedings.* Hearings, including *ex parte* presentations made by the Division of Enforcement pursuant to § 201.513, shall be recorded or transcribed pursuant to § 201.302.

§ 201.511 Temporary cease-and-desist orders: Notice; procedures for hearing.

(a) *Notice: how given.* Notice of an application for a temporary cease-and-desist order shall be made by serving a notice of hearing and order to show cause pursuant to § 201.141(b) or, where timely service of a notice of hearing pursuant to § 201.141(b) is not practicable, by any other means reasonably calculated to give actual notice that a hearing will be held, including telephonic notification of the general subject matter, time, and place of the hearing. If an application is made *ex parte*, pursuant to § 201.513, no notice to a respondent need be given prior to the Commission's consideration of the application.

(b) *Hearing before the Commission.* Except as provided in paragraph (d) of this section, hearings on an application for a temporary cease-and-desist order shall be held before the Commission.

(c) *Presiding officer: designation.* The Chairman shall preside or designate a Commissioner to preside at the hearing. If the Chairman is absent or unavailable at the time of hearing and no other Commissioner has been designated to preside, the duty officer on the day the hearing begins shall preside or designate another Commissioner to preside.

(d) *Procedure at hearing.* (1) The presiding officer shall have all those powers of a hearing officer set forth in § 201.111 and shall rule on the admissibility of evidence and other procedural matters, including, but not limited to whether oral testimony will be heard; the time allowed each party for the submission of evidence or argument; and whether post-hearing submission of briefs, proposed findings of fact and conclusions of law will be permitted and if so, the procedures for submission; provided, however, that the person presiding may consult with other Commissioners participating in the hearing on these or any other question of procedure.

(2) Each Commissioner present at the hearing shall be afforded a reasonable opportunity to ask questions of witnesses, if any, or of counsel.

(3) A party or witness may participate by telephone. Alternative means of remote access, including a video link, shall be permitted in the Commission's discretion. Factors the Commission may consider in determining whether to permit alternative means of remote access include, but are not limited to, whether allowing an alternative means of access will delay the hearing, whether the alternative means is reliable, and whether the party proposing its use has made arrangements to pay for its cost.

(4) After a hearing has begun, the Commission may, on its own motion, or the motion of a party, assign a hearing officer to preside at the taking of oral testimony or other evidence and to certify the record of such testimony or other evidence to the Commission within a fixed period of time. No recommended or initial decision shall be made by such a hearing officer.

§ 201.512 Temporary cease-and-desist orders: Issuance after notice and opportunity for hearing.

(a) *Basis for issuance.* A temporary cease-and-desist order shall be issued only if the Commission determines that the alleged violation or threatened violation specified in an order instituting proceedings whether to enter a permanent cease-and-desist order pursuant to Securities Act Section 8A(a), 15 U.S.C. 77h-1(a), Exchange Act

Section 21C(a), 15 U.S.C. 78u-3(a), Investment Company Act Section 9(f)(1), 15 U.S.C. 80a-9(f)(1), or Investment Advisers Act Section 203(k)(1), 15 U.S.C. 80b-3(k)(1), or the continuation thereof, is likely to result in significant dissipation or conversion of assets, significant harm to investors, or substantial harm to the public interest, including, but not limited to, losses to the Securities Investor Protection Corporation, prior to the completion of proceedings on the permanent cease-and-desist order.

(b) *Content, scope and form of order.* Every temporary cease-and-desist order granted shall:

(1) Describe the basis for its issuance, including the alleged or threatened violations and the harm that is likely to result without the issuance of an order;

(2) Describe in reasonable detail, and not by reference to the order instituting proceedings or any other document, the act or acts the respondent is to take or refrain from taking; and

(3) Be indorsed with the date and hour of issuance.

(c) *Effective upon service.* A temporary cease-and-desist order is effective upon service upon the respondent.

(d) *Service: how made.* Service of a temporary cease-and-desist order shall be made pursuant to § 201.141(a). The person who serves the order shall promptly file a declaration of service identifying the person served, the method of service, the date of service, the address to which service was made and the person who made service; provided, however, failure to file such a declaration shall have no effect on the validity of the service.

(e) *Commission review.* At any time after the respondent has been served with a temporary cease-and-desist order, the respondent may apply to the Commission to have the order set aside, limited or suspended. The application shall set forth with specificity the facts that support the request.

§ 201.513 Temporary cease-and-desist orders: Issuance without prior notice and opportunity for hearing.

In addition to the requirements for issuance of a temporary cease-and-desist order set forth in § 201.512, the fol-

lowing requirements shall apply if a temporary cease-and-desist order is to be entered without prior notice and opportunity for hearing:

(a) *Basis for issuance without prior notice and opportunity for hearing.* A temporary cease-and-desist order may be issued without notice and opportunity for hearing only if the Commission determines, from specific facts in the record of the proceeding, that notice and hearing prior to entry of an order would be impracticable or contrary to the public interest.

(b) *Content of the order.* An *ex parte* temporary cease-and-desist order shall state specifically why notice and hearing would have been impracticable or contrary to the public interest.

(c) *Hearing before the Commission.* If a respondent has been served with a temporary cease-and-desist order entered without a prior Commission hearing, the respondent may apply to the Commission to have the order set aside, limited, or suspended, and if the application is made within 10 days after the date on which the order was served, may request a hearing on such application. The Commission shall hold a hearing and render a decision on the respondent's application at the earliest possible time. The hearing shall begin within two days of the filing of the application unless the applicant consents to a longer period or the Commission, by order, for good cause shown, sets a later date. The Commission shall render a decision on the application within five calendar days of its filing, provided, however, that the Commission, by order, for good cause shown, may extend the time within which a decision may be rendered for a single period of five calendar days, or such longer time as consented to by the applicant. If the Commission does not render its decision within 10 days of the respondent's application or such longer time as consented to by the applicant, the temporary order shall be suspended until a decision is rendered.

(d) *Presiding officer, procedure at hearing.* Procedures with respect to the selection of a presiding officer and the conduct of the hearing shall be in accordance with § 201.511.

§ 201.514 Temporary cease-and-desist orders: Judicial review; duration.

(a) *Availability of judicial review.* Judicial review of a temporary cease-and-desist order shall be available as provided in Section 8A(d)(2) of the Securities Act, 15 U.S.C. 77h-1(d)(2), Section 21C(d)(2) of the Exchange Act, 15 U.S.C. 78u-3(d)(2), Section 9(f)(4)(B) of the Investment Company Act, 15 U.S.C. 80a-9(f)(4)(B), or Section 203(k)(4)(B) of the Investment Advisers Act, 15 U.S.C. 80b-3(k)(4)(B).

(b) *Duration.* Unless set aside, limited, or suspended, either by order of the Commission, a court of competent jurisdiction, or a hearing officer acting pursuant to § 201.531, or by operation of § 201.513, a temporary cease-and-desist order shall remain effective and enforceable until the earlier of:

(1) The completion of the proceedings whether a permanent order shall be entered; or

(2) 180 days, or such longer time as consented to by the respondent, after issuance of a briefing schedule order pursuant to § 201.540(b), if an initial decision whether a permanent order should be entered is appealed.

§ 201.520 Suspension of registration of brokers, dealers, or other Exchange Act-registered entities: Application.

(a) *Procedure.* A request for suspension of a registered broker, dealer, municipal securities dealer, government securities broker, government securities dealer, or transfer agent pending a final determination whether the registration shall be revoked shall be made by application filed by the Division of Enforcement. The application shall set forth the statutory provision or rule that each respondent is alleged to have violated and the temporary suspension sought as to each respondent.

(b) *Accompanying documents.* The application shall be accompanied by a declaration of facts signed by a person with knowledge of the facts contained therein, a memorandum of points and authorities, a proposed order imposing the temporary suspension of registration sought, and a proposed notice of hearing and order to show cause whether the temporary suspension of registration should be imposed. If a pro-

ceeding to determine whether to revoke the registration permanently has not already been commenced, a proposed order instituting proceedings to determine whether a permanent sanction should be imposed shall also be filed with the application.

(c) *With whom filed.* The application shall be filed with the Secretary or, if the Secretary is unavailable, with the duty officer. In no event shall an application be filed with an administrative law judge.

(d) *Record of hearings.* All hearings shall be recorded or transcribed pursuant to § 201.302.

§ 201.521 Suspension of registration of brokers, dealers, or other Exchange Act-registered entities: Notice and opportunity for hearing on application.

(a) *How given.* Notice of an application to suspend a registration pursuant to § 201.520 shall be made by serving a notice of hearing and order to show cause pursuant to § 201.141(b) or, where timely service of a notice of hearing pursuant to § 201.141(b) is not practicable, by any other means reasonably calculated to give actual notice that a hearing will be held, including telephonic notification of the general subject matter, time, and place of the hearing.

(b) *Hearing: before whom held.* Except as provided in paragraph (d) of this section, hearings on an application to suspend a registration pursuant to § 201.520 shall be held before the Commission.

(c) *Presiding officer: designation.* The Chairman shall preside or designate a Commissioner to preside at the hearing. If the Chairman is absent or unavailable at the time of hearing and no other Commissioner has been designated to preside, the duty officer on the day the hearing begins shall preside or designate another Commissioner to preside.

(d) *Procedure at hearing.* (1) The presiding officer shall have all those powers of a hearing officer set forth in § 201.111 and shall rule on the admissibility of evidence and other procedural matters, including, but not limited to whether oral testimony will be heard; the time allowed each party for the submission of evidence or argument; and whether post-hearing submission

of briefs, proposed findings of fact and conclusions of law will be permitted and if so, the procedures for submission; provided, however, that the person presiding may consult with other Commissioners participating in the hearing on these or any other question of procedure.

(2) Each Commissioner present at the hearing shall be afforded a reasonable opportunity to ask questions of witnesses, if any, or counsel.

(3) A party or witness may participate by telephone. Alternative means of remote access, including a video link, shall be permitted in the Commission's discretion. Factors the Commission may consider in determining whether to permit alternative means of remote access include, but are not limited to, whether allowing an alternative means of access will delay the hearing, whether the alternative means is reliable, and whether the party proposing its use has made arrangements to pay for its cost.

(4) After a hearing has begun, the Commission may, on its own motion or the motion of a party, assign a hearing officer to preside at the taking of oral testimony or other evidence and to certify the record of such testimony or other evidence to the Commission within a fixed period of time. No recommended or initial decision shall be made.

§ 201.522 Suspension of registration of brokers, dealers, or other Exchange Act-registered entities: Issuance and review of order.

(a) *Basis for issuance.* An order suspending a registration, pending final determination as to whether the registration shall be revoked shall be issued only if the Commission finds that the suspension is necessary or appropriate in the public interest or for the protection of investors.

(b) *Content, scope and form of order.* Each order suspending a registration shall:

(1) Describe the basis for its issuance, including the alleged or threatened violations and the harm that is likely to result without the issuance of an order;

(2) Describe in reasonable detail, and not by reference to the order insti-

tuting proceedings or any other document, the act or acts the respondent is to take or refrain from taking; and

(3) Be indorsed with the date and hour of issuance.

(c) *Effective upon service.* An order suspending a registration is effective upon service upon the respondent.

(d) *Service: how made.* Service of an order suspending a registration shall be made pursuant to § 201.141(a). The person who serves the order shall promptly file a declaration of service identifying the person served, the method of service, the date of service, the address to which service was made and the person who made service; provided, however, failure to file such a declaration shall have no effect on the validity of the service.

(e) *Commission review.* At any time after the respondent has been served with an order suspending a registration, the respondent may apply to the Commission or the hearing officer to have the order set aside, limited, or suspended. The application shall set forth with specificity the facts that support the request.

§ 201.523 [Reserved]

§ 201.524 Suspension of registrations: Duration.

Unless set aside, limited or suspended by order of the Commission, a court of competent jurisdiction, or a hearing officer acting pursuant to § 201.531, an order suspending a registration shall remain effective and enforceable until the earlier of:

(a) The completion of the proceedings whether the registration shall be permanently revoked; or

(b) 180 days, or such longer time as consented to by the respondent, after issuance of a briefing schedule order pursuant to § 201.540(b), if an initial decision whether the registration shall be permanently revoked is appealed.

§ 201.530 Initial decision on permanent order: Timing for submitting proposed findings and preparation of decision.

Unless otherwise ordered by the Commission or hearing officer, if a temporary cease-and-desist order or suspension of registration order is in effect, the following time limits shall

§ 201.531

apply to preparation of an initial decision as to whether such order should be made permanent:

(a) Proposed findings and conclusions and briefs in support thereof shall be filed 30 days after the close of the hearing;

(b) The record in the proceedings shall be served by the Secretary upon the hearing officer three days after the date for the filing of the last brief called for by the hearing officer; and

(c) The initial decision shall be filed with the Secretary at the earliest possible time, but in no event more than 30 days after service of the record, unless the hearing officer, by order, shall extend the time for good cause shown for a period not to exceed 30 days.

§ 201.531 Initial decision on permanent order: Effect on temporary order.

(a) *Specification of permanent sanction.* If, at the time an initial decision is issued, a temporary sanction is in effect as to any respondent, the initial decision shall specify:

(1) Which terms or conditions of a temporary cease-and-desist order, if any, shall become permanent; and

(2) Whether a temporary suspension of a respondent's registration, if any, shall be made a permanent revocation of registration.

(b) *Modification of temporary order.* If any temporary sanction shall not become permanent under the terms of the initial decision, the hearing officer shall issue a separate order setting aside, limiting or suspending the temporary sanction then in effect in accordance with the terms of the initial decision. The hearing officer shall decline to suspend a term or condition of a temporary cease-and-desist order if it is found that the continued effectiveness of such term or condition is necessary to effectuate any term of the relief ordered in the initial decision, including the payment of disgorgement, interest or penalties. An order modifying temporary sanctions shall be effective 14 days after service. Within one week of service of the order modifying temporary sanctions any party may seek a stay or modification of the order from the Commission pursuant to § 201.401.

17 CFR Ch. II (4-1-00 Edition)

§ 201.540 Appeal and Commission review of initial decision making a temporary order permanent.

(a) *Petition for review.* Any person who seeks Commission review of an initial decision as to whether a temporary sanction shall be made permanent shall file a petition for review pursuant to § 201.410, provided, however, that the petition must be filed within 10 days after service of the initial decision.

(b) *Review procedure.* If the Commission determines to grant or order review, it shall issue a briefing schedule order pursuant to § 201.450. Unless otherwise ordered by the Commission, opening briefs shall be filed within 21 days of the order granting or ordering review, and opposition briefs shall be filed within 14 days after opening briefs are filed. Reply briefs shall be filed within seven days after opposition briefs are filed. Oral argument, if granted by the Commission, shall be held within 90 days of the issuance of the briefing schedule order.

§ 201.550 Summary suspensions pursuant to Exchange Act Section 12(k)(1)(A).

(a) *Petition for termination of suspension.* Any person adversely affected by a suspension pursuant to Section 12(k)(1)(A) of the Exchange Act, 15 U.S.C. 78l(k)(1)(A), who desires to show that such suspension is not necessary in the public interest or for the protection of investors may file a sworn petition with the Secretary, requesting that the suspension be terminated. The petition shall set forth the reasons why the petitioner believes that the suspension of trading should not continue and state with particularity the facts upon which the petitioner relies.

(b) *Commission consideration of a petition.* The Commission, in its discretion, may schedule a hearing on the matter, request additional written submissions, or decide the matter on the facts presented in the petition and any other relevant facts known to the Commission. If the petitioner fails to cooperate with, obstructs, or refuses to permit the making of an examination by the Commission, such conduct shall be grounds to deny the petition.

Securities and Exchange Commission

§ 201.611

RULES REGARDING DISGORGEMENT AND PENALTY PAYMENTS

§ 201.600 Interest on sums disgorged.

(a) *Interest required.* Prejudgment interest shall be due on any sum required to be paid pursuant to an order of disgorgement. The disgorgement order shall specify each violation that forms the basis for the disgorgement ordered; the date which, for purposes of calculating disgorgement, each such violation was deemed to have occurred; the amount to be disgorged for each such violation; and the total sum to be disgorged. Prejudgment interest shall be due from the first day of the month following each such violation through the last day of the month preceding the month in which payment of disgorgement is made. The order shall state the amount of prejudgment interest owed as of the date of the disgorgement order and that interest shall continue to accrue on all funds owed until they are paid.

(b) *Rate of interest.* Interest on the sum to be disgorged shall be computed at the underpayment rate of interest established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. 6621(a)(2), and shall be compounded quarterly. The Commission or the hearing officer may, by order, specify a lower rate of prejudgment interest as to any funds which the respondent has placed in an escrow or otherwise guaranteed for payment of disgorgement upon a final determination of the respondent's liability. Escrow and other guarantee arrangements must be approved by the Commission or the hearing officer prior to entry of the disgorgement order.

§ 201.601 Prompt payment of disgorgement, interest and penalties.

(a) *Timing of payments.* Unless otherwise provided, funds due pursuant to an order by the Commission requiring the payment of disgorgement, interest or penalties shall be paid no later than 21 days after service of the order, and funds due pursuant to an order by a hearing officer shall be paid on the first day after the order becomes final pursuant to § 201.360.

(b) *Stays.* A stay of any order requiring the payment of disgorgement, interest or penalties may be sought at any time pursuant to § 201.401.

§ 201.610 Submission of proposed plan of disgorgement.

The Commission or the hearing officer may, at any time, order any party to submit a plan for the administration and distribution of disgorgement funds. Unless ordered otherwise, the Division of Enforcement shall submit a proposed plan no later than 60 days after funds or other assets have been turned over by the respondent pursuant to a Commission disgorgement order and any appeals of the disgorgement order have been waived or completed, or appeal is no longer available.

§ 201.611 Contents of plan of disgorgement; provisions for payment.

(a) *Required plan elements.* Unless otherwise ordered, a plan for the administration of a disgorgement fund shall include the following elements:

(1) Procedures for the receipt of additional funds, including the specification of an account where funds will be held and the instruments in which the funds may be invested;

(2) Specification of categories of persons potentially eligible to receive proceeds from the fund;

(3) Procedure for providing notice to such persons of the existence of the fund and their potential eligibility to receive proceeds of the fund;

(4) Procedures for making and approving claims, procedures for handling disputed claims and a cut-off date for the making of claims;

(5) A proposed date for the termination of the fund, including provision for the disposition of any funds not otherwise distributed;

(6) Procedures for the administration of the fund, including selection, compensation and, as necessary, indemnification of a fund administrator to oversee the fund, process claims, prepare accountings, file tax returns and, subject to the approval of the Commission, make distributions from the fund to investors; and

(7) Such other provisions as the Commission or the hearing officer may require.

(b) *Payment to registry of the court or court-appointed receiver.* Subject to such conditions as the Commission or the hearing officer shall deem appropriate, a plan of disgorgement may provide for payment of disgorgement funds into a court registry or to a court-appointed receiver in any case pending in federal or state court against a respondent or any other person based upon a complaint alleging violations arising from the same or substantially similar facts as those alleged in the Commission's order instituting proceedings.

(c) *Payment to the United States Treasury under certain circumstances.* When, in the opinion of the Commission or the hearing officer, the cost of administering a plan of disgorgement relative to the value of the available disgorgement funds and the number of potential claimants would not justify distribution of the disgorgement funds to injured investors, the plan may provide that the funds shall be paid directly to the general fund of the United States Treasury.

§ 201.612 Notice of proposed plan of disgorgement and opportunity for comment by non-parties.

Notice of a proposed plan of disgorgement shall be published in the *SEC News Digest*, in the *SEC Docket*, and in such other publications as the Commission or the hearing officer may require. The notice shall specify how copies of the proposed plan may be obtained and shall state that persons desiring to comment on the proposed plan may submit their views, in writing, to the Commission.

§ 201.613 Order approving, modifying or disapproving proposed plan of disgorgement.

At any time more than 30 days after publication of notice of a proposed plan of disgorgement, the hearing officer or the Commission shall, by order, approve, approve with modifications, or disapprove the proposed plan. In the discretion of the Commission or the hearing officer, a proposed plan of disgorgement that is substantially modified prior to adoption may be re-

published for an additional comment period pursuant to § 201.612. The order approving or disapproving the plan should be entered within 30 days after the end of the final period allowed for comments on the proposed plan unless the Commission or the hearing officer, by written order, allows a longer period for good cause shown.

§ 201.614 Administration of plan of disgorgement.

(a) *Appointment and removal of administrator.* The Commission or the hearing officer shall have discretion to appoint any person, including a Commission employee, as administrator of a plan of disgorgement and to delegate to that person responsibility for administering the plan. A respondent may be required or permitted to administer or assist in administering a plan of disgorgement, subject to such terms and conditions as the Commission or the hearing officer deem appropriate to ensure the proper distribution of funds. An administrator may be removed at any time by order of the Commission or hearing officer.

(b) *Administrator to post bond.* If the administrator is not a Commission employee, the administrator shall be required to obtain a bond in the manner prescribed by 11 U.S.C. 322, in an amount to be approved by the Commission. The cost of the bond may be paid for as a cost of administration. The Commission may waive posting of a bond for good cause shown.

(c) *Administrator's fees.* If the administrator is a Commission employee, no fee shall be paid to the administrator for his or her services. If the administrator is not a Commission employee, he or she may file an application for fees for completed services, and upon approval by the Commission or a hearing officer, may be paid a reasonable fee for those services. Any objections thereto shall be filed within 21 days of service of the application on the parties.

(d) *Source of funds.* Unless otherwise ordered, fees and other expenses of administering the plan of disgorgement shall be paid first from the interest earned on disgorged funds, and if the interest is not sufficient, then from the corpus.

(e) *Accountings.* During the first 10 days of each calendar quarter, or as otherwise directed by the Commission or the hearing officer, the administrator shall file an accounting of all monies earned or received and all monies spent in connection with the administration of the plan of disgorgement. A final accounting shall be submitted for approval of the Commission or hearing officer prior to discharge of the administrator and cancellation of the administrator's bond, if any.

(f) *Amendment.* A plan may be amended upon motion by any party or the plan administrator or upon the Commission's or hearing officer's own motion.

§ 201.620 Right to challenge order of disgorgement.

Other than in connection with the opportunity to submit comments as provided in § 201.612, no person shall be granted leave to intervene or to participate in a proceeding or otherwise to appear to challenge an order of disgorgement; or an order approving, approving with modifications, or disapproving a plan of disgorgement; or any determination relating to a plan of disgorgement based solely upon that person's eligibility or potential eligibility to participate in a disgorgement fund or based upon any private right of action such person may have against any person who is also a respondent in an enforcement proceeding.

§ 201.630 Inability to pay disgorgement, interest or penalties.

(a) *Generally.* In any proceeding in which an order requiring payment of disgorgement, interest or penalties may be entered, a respondent may present evidence of an inability to pay disgorgement, interest or a penalty. The Commission may, in its discretion, or the hearing officer may, in his or her discretion, consider evidence concerning ability to pay in determining whether disgorgement, interest or a penalty is in the public interest.

(b) *Financial disclosure statement.* Any respondent who asserts an inability to pay disgorgement, interest or penalties may be required to file a sworn finan-

cial disclosure statement and to keep the statement current. The financial statement shall show the respondent's assets, liabilities, income or other funds received and expenses or other payments, from the date of the first violation alleged against that respondent in the order instituting proceedings, or such later date as specified by the Commission or a hearing officer, to the date of the order requiring the disclosure statement to be filed. By order, the Commission or the hearing officer may prescribe the use of the Disclosure of Assets and Financial Information Form (see Form D-A at § 209.1 of this chapter) or any other form, may specify other time periods for which disclosure is required, and may require such other information as deemed necessary to evaluate a claim of inability to pay.

(c) *Confidentiality.* Any respondent submitting financial information pursuant to this section or § 201.410(c) may make a motion, pursuant to § 201.322, for the issuance of a protective order against disclosure of the information submitted to the public or to any parties other than the Division of Enforcement. Prior to a ruling on the motion, no party receiving information as to which a motion for a protective order has been made may transfer or convey the information to any other person without the prior permission of the Commission or the hearing officer.

(d) *Service required.* Notwithstanding any provision of § 201.322, a copy of the financial disclosure statement shall be served on the Division of Enforcement.

(e) *Failure to file required financial information: sanction.* Any respondent who, after making a claim of inability to pay either disgorgement, interest or a penalty, fails to file a financial disclosure statement when such a filing has been ordered or is required by rule may, in the discretion of the Commission or the hearing officer, be deemed to have waived the claim of inability to pay. No sanction pursuant to §§ 201.155 or 201.180 shall be imposed for a failure to file such a statement.

§ 201.900

INFORMAL PROCEDURES AND SUPPLEMENTARY INFORMATION CONCERNING ADJUDICATORY PROCEEDINGS

§ 201.900 Informal Procedures and Supplementary Information Concerning Adjudicatory Proceedings.

(a) *Guidelines for the timely completion of proceedings.* (1) Timely resolution of adjudicatory proceedings is one factor in assessing the effectiveness of the adjudicatory program in protecting investors, promoting public confidence in the securities markets and assuring respondents a fair hearing. Establishment of guidelines for the timely completion of key phases of contested administrative proceedings provides a standard for both the Commission and the public to gauge the Commission's adjudicatory program on this criterion. The Commission has directed that, to the extent possible:

(i) An administrative law judge's initial decision should be filed with the Secretary within 10 months of issuance of the order instituting proceedings.

(ii) A decision by the Commission on review of an interlocutory matter should be completed within 45 days of the date set for filing the final brief on the matter submitted for review.

(iii) A decision by the Commission on a motion to stay a decision that has already taken effect or that will take effect within five days of the filing of the motion, should be issued within five days of the date set for filing of the opposition to the motion for a stay. If the decision complained of has not taken effect, the Commission's decision should be issued within 45 days of the date set for filing of the opposition to the motion for a stay.

(iv) A decision by the Commission with respect to an appeal from the initial decision of a hearing officer, a review of a determination by a self-regulatory organization, or a remand of a prior Commission decision by a court of appeals should be issued within 11 months from the date the petition for review, application for review, or mandate of the court is filed.

(2) The guidelines in this paragraph (a) do not create a requirement that each portion of a proceeding or the entire proceeding be completed within the periods described. Among other

17 CFR Ch. II (4-1-00 Edition)

reasons, a proceeding at either the hearing stage or on review by the Commission may require additional time because it is unusually complex or because the record is exceptionally long. In addition, fairness is enhanced if the Commission's deliberative process is not constrained by an inflexible schedule. In some proceedings, deliberation may be delayed by the need to consider more urgent matters, to permit the preparation of dissenting opinions, or for other good cause. The guidelines will be used by the Commission as one of several criteria in monitoring and evaluating its adjudicatory program. The guidelines will be examined periodically, and, if necessary, readjusted in light of changes in the pending caseload and the available level of staff resources.

(b) *Reports to the Commission on pending cases.* The administrative law judges, the Secretary and the General Counsel have each been delegated authority to issue certain orders or adjudicate certain proceedings. See 17 CFR 200.30-1 *et seq.* Proceedings are also assigned to the General Counsel for the preparation of a proposed order or opinion which will then be recommended to the Commission for consideration. In order to improve accountability by and to the Commission for management of the docket, the Commission has directed that confidential status reports with respect to all filed adjudicatory proceedings shall be made periodically to the Commission. These reports will be made through the Secretary, with a minimum frequency established by the Commission. In connection with these periodic reports, if a proceeding assigned to an administrative law judge or pending before the Commission has not been concluded within 30 days of the guidelines established in paragraph (a) of this section, the Chief Administrative Law Judge or the General Counsel, respectively, shall specifically apprise the Commission of that fact, and shall describe the procedural posture of the case, project an estimated date for conclusion of the proceeding, and provide such other information as is necessary to enable the Commission to determine whether additional steps

Securities and Exchange Commission

Part 201, Subpt. D, Table I

are necessary to reach a fair and timely resolution of the matter.

(c) *Publication of information concerning the pending case docket.* Ongoing disclosure of information about the adjudication program caseload increases awareness of the importance of the program, facilitates oversight of the program and promotes confidence in the efficiency and fairness of the program by investors, securities industry participants, self-regulatory organizations and other members of the public. The Commission has directed the Secretary to publish in the *SEC Docket* in the first and seventh months of each fiscal year summary statistical information about the status of pending adjudicatory proceedings and changes in the Commission's caseload over the prior six months. The report will include the number of cases pending before the administrative law judges and the Commission at the beginning and end of the six-month period. The report will also show increases in the caseload arising from new cases being instituted, appealed or remanded to the Commission and decreases in the caseload arising from the disposition of proceedings by issuance of initial decisions, issuance of final decisions issued on appeal of initial decisions, other dispositions of appeals of initial decisions, final decisions on review of self-regulatory organization determinations, other dispositions on review of self-regulatory organization determinations, and decisions with respect to stays or interlocutory motions. For each category of decision, the report shall also show the median age of the cases at the time of the decision and the number of cases decided within the guidelines for the timely completion of adjudicatory proceedings.

TABLE I TO SUBPART D—ADVERSARY ADJUDICATIONS CONDUCTED BY THE COMMISSION UNDER 5 U.S.C. 554

SECURITIES EXCHANGE ACT OF 1934

Section 11A(b)(6), 15 U.S.C. 78k-1(b)(6) (suspension or revocation of registration, or censure of a securities information processor).

Section 11A(c)(3)(A), 15 U.S.C. 78k-1(c)(3)(A) (prohibition of transactions by brokers and dealers in registered securities other than on a national securities exchange).

Section 12(j), 15 U.S.C. 78l(j) (suspensions of effective date or revocation of registration of a security).

Section 15(b)(4), 15 U.S.C. 78o(b)(4) (suspension or revocation of registration, or censure of a broker or dealer).

Section 15(b)(6)(A), 15 U.S.C. 78o(b)(6)(A) (censure, suspension or bar an associate of a broker or a dealer).

Section 15B(c)(2), 15 U.S.C. 78o-4(c)(2) (suspension or revocation of registration, or censure of a municipal securities dealer).

Section 15B(c)(4), 15 U.S.C. 78o-4(c)(4) (censure, suspension or bar of an associate of a municipal securities broker or dealer).

Section 15B(c)(8), 15 U.S.C. 78o-4(c)(8) (removal or censure of member of the Municipal Securities Rulemaking Board).

Section 15C(c)(1)(A), 15 U.S.C. 78o-5(c)(1)(A) (suspension or revocation of registration, or censure of a government securities broker or dealer).

Section 15C(c)(1)(C), 15 U.S.C. 78o-5(c)(1)(C) (censure, suspension or bar of an associate of a government securities broker or dealer).

Section 17A(c)(3), 15 U.S.C. 78q-1(c)(3) (deny registration, censure, place limitation on, suspend, or revoke registration of a transfer agent).

Section 17A(c)(4)(C), 15 U.S.C. 78q-1(c)(4)(C) (censure, place limitations on, suspend or bar certain persons associated or seeking to associate with a transfer agent).

Section 19(h)(1), 15 U.S.C. 78s(h)(1) (suspension or revocation of registration, or censure of a self-regulatory organization).

Section 19(h)(2), 15 U.S.C. 78s(h)(2) (suspension or expulsion of a member of a self-regulatory organization).

Section 19(h)(3), 15 U.S.C. 78s(h)(3) (suspension or bar of a person from being associated with a national securities exchange or registered securities association).

Section 19(h)(4), 15 U.S.C. 78s(h)(4) (removal or censure of a director or officer of a self-regulatory organization).

Section 21B(a), 15 U.S.C. 78u-2(a) (imposition of civil penalties against any person for violation of the federal securities laws).

INVESTMENT COMPANY ACT OF 1940

Section 9(d)(1), 15 U.S.C. 80a-9(d)(1) (imposition of civil penalties against any person for violation of the federal securities laws).

INVESTMENT ADVISERS ACT OF 1940

Section 203(e), 15 U.S.C. 80b-3(e) (suspension or revocation of registration, or censure of an investment adviser).

Section 203(f), 15 U.S.C. 80b-3(f) (censure, suspension, or bar of an associate of an investment adviser).

Section 203(i)(1), 15 U.S.C. 80b-3(i)(1) (imposition of civil penalties against any person for violation of the federal securities laws).

Part 201, Subpt. D, Table II

17 CFR Ch. II (4–1–00 Edition)

TABLE II TO SUBPART D—CROSS-REFERENCE SHOWING LOCATION OF RULES OF PRACTICE ADOPTED IN 1955 WITH FORMER RULES OF PRACTICE, RELATED RULES, AND STATUTORY PROVISIONS

New rules (17 CFR 201)	Former rules/Act §
100	1.
101	none.
102	2.
102(d)(4)	none.
103(a)–(c)	none.
104	5.
110	11(b).
111	11(d)–(e), 16(g).
112	11(c).
120	5 U.S.C. 554(d).
121	5 U.S.C. 554(d).
140(a)	22(h).
140(b)–(c)	22(k).
141(a)	6(a), (b), (f).
141(b)	23(d).
150(a)	23(a).
150(b)	2(d), (h).
150(c)	23(b).
150(d)	23(c).
151	12(b), 22(a).
152(a)–(e)	22(a)–(h).
152(f)	20(d).
153	7(f).
154	11(e).
155	12(d).
160	22(j), 23(b).
161	13.
180(a)	2(f).
180(b)–(c)	none.
190	25.
191	27, 28.
192	4.
193	29.
200(a)(1)	6(a), (b).
200(a)(2)	6(f).
200(b), (c)	6(a), (b).
200(d)	6(d).
200(e)	6(c).
201	10.
202	8(b), (c).
210	9.
220	7(a)–(e).
221(a)–(c), (e)	8(d).
221(d)	none.
221(f)	6(e).
222(a)	8(d).
222(b)	none.
230	none.
231(a)	11–1.
231(b)	none.
232(a)–(d)	14(b).
232(e)–(f)	14(b)(2), (c).
233	15(a)–(e).
234	15(g).
235	15(f).
240	8(a).
250	11(e).
300	11(a)–(b).
301	11(b).
302(a)	11(f).
302(b)	25(d).
302(c)	20(c).
310	6(e).
320	14(a).
321(a)	11(e).
321(b)	none.

New rules (17 CFR 201)	Former rules/Act §
322	none.
323	14(d).
324	none.
325	14(a).
326	14(a).
340	16(d)–(e).
350	20(a)–(b).
351	20(a)(4).
360(a)	16(b).
360(b)	16(a).
360(c)	16(f).
360(d), (e)	17(f).
400	12(a).
401	12(c).
401(d)(2)	15 U.S.C. 78s(d)(2).
410(a)	17(a).
410(b)	17(b).
410(c)	none.
410(d)	none.
410(e)	17(h).
411(a)	17(g)(2).
411(b)	17(d).
411(c)	17(c).
411(d)	17(g)(1).
411(e)	17(d).
411(f)	17(g)(3).
420(a), (b), (d)	17 CFR 240.19d–3(b).
420(c)	15 U.S.C. 78s(d)(2).
420(d)	58.
421(a)	15 U.S.C. 78s(e)–(f).
421(b)–(c)	none.
430	26(a), (c).
431(a)	none.
431(b)	26(b).
431(c)	26(d).
431(d)–(f)	26(e).
450(a)	17(e).
450(b)	18, 17 CFR 240.19d–3(c)–(g).
450(c)	22(d).
451	21.
452	21(d).
460	20, 21(c).
470	21(e).
490	23(e).
500	none.
510	none.
511	none.
512	none.
513	none.
514	none.
520	none.
521	none.
522	none.
524	none.
530	19.
531	none.
540	none.
550	17 CFR 202.8.
600	none.
601	none.
610	none.
611	none.
612	none.
613	none.
614	none.
620	none.
630	none.
900	none.

Securities and Exchange Commission

Part 201, Subpt. E, Table I

TABLE III TO SUBPART D—CROSS-REFERENCE TABLE SHOWING LOCATION OF FORMER RULES OF PRACTICE AND RELATED RULES WITH RULES OF PRACTICE ADOPTED IN 1995

Former rules	New rules (17 CFR 201)
1	100.
2	102.
2(d), (h)	150(b).
2(f)	180(a).
3 [reserved]	n/a.
4	192.
5	104.
6(a)	200(b).
6(a),(b),(f)	141(a).
6(a), (b)	200(a)(1).
6(b)	200(c).
6(c), (d)	200(d), (e).
6(e)	221(f), 310.
6(f)	200(a)(2).
7(a)–(e)	220.
7(f)	153.
8(a)	240.
8(b)–(c)	202.
8(d)	221, 222(a).
9	210.
10	201.
11(a)–(b)	300.
11(b)	110, 301.
11(c)	112.
11(d), (e)	111.
11(e)	154, 250, 321(a).
11(f)	302(a).
11–1	231(a).
12(a)	400.
12(b)	151(c).
12(c)	401.
12(d)	155.
13	161.
14(a)	320, 325, 326.
14(b)	232(a)–(d).
14(b)(2), (c)	232(e)–(f).
14(d)	323.
15(a)–(e)	233.
15(f)	235.
15(g)	234.
16(a)	360(b).
16(b)	360(a).
16(c) [reserved]	n/a.
16(d)–(e)	340.
16(f)	351, 360(c).
16(g)	111.
17(a)	410(a).
17(b)	410(b).
17(c)	411(c).
17(d)	411(b), (e).
17(e)	450(a), (d).
17(f)	360(d), (e).
17(g)	411(d), (a), (f).
17(h)	410(e).
18	450(b).
19	530.
20(a)–(b)	350, 351, 460.
20(c)	302(c).
20(d)	152(f).
21	451.

Former rules	New rules (17 CFR 201)
21(c)	460.
21(d)	452.
21(e)	470.
22(a)	151(a)–(c), 152.
22(b) [reserved]	n/a.
22(c)	152(d).
22(d)	152(e), 450(c).
22(e)–(g)	152(a)–(c).
22(h)	140(a).
22(i)	none.
22(j), (k)	160, 140(c).
22(k)	140(b).
23(a)	150(a).
23(b)	150(c), 160.
23(c)	150(d).
23(d)	141(b).
23(e)	490.
24	17 CFR 228.10(f), 17 CFR 229.10(d).
25	190.
25(d)	302(b).
26(a), (c)	430.
26(b)	431(b).
26(d)	431(c).
26(e)	431(d)–(f).
27	191.
28	191.
29	193.
17 CFR 202.8	550.
17 CFR 240.19d–2	401(a)–(b), (d).
17 CFR 240.19d–3(a)	420, 421.
17 CFR 240.19d–3(b)	420(a), (b), (d).
17 CFR 240.19d–3(c)–(d)	450, 180(c).
17 CFR 240.19d–3(e)	452.
17 CFR 240.19d–3(f)	451.
17 CFR 240.19d–3(g)	100.

Subpart E—Adjustment of Civil Monetary Penalties

AUTHORITY: Pub. L. 104–134, 110 Stat. 1321.

SOURCE: 61 FR 57774, Nov. 8, 1996, unless otherwise noted.

§ 201.1001 Adjustment of civil monetary penalties.

As required by the Debt Collection Improvement Act of 1996, the maximum amounts of all civil monetary penalties under the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940, and the Investment Advisers Act of 1940 are adjusted for inflation in accordance with Table I to this subpart. The adjustments set forth in Table I apply to violations occurring after December 9, 1996.

TABLE 1 TO SUBPART E—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS

U.S. code citation	Civil monetary penalty description	Year penalty amount was last set by law	Original statutory maximum penalty amount	Adjusted maximum penalty amount
SECURITIES AND EXCHANGE COMMISSION: 15 USC 77(d)	FOR NATURAL PERSON	1990	\$5,000	\$5,500
	FOR ANY OTHER PERSON	1990	50,000	55,000
	FOR NATURAL PERSON/FRAUD	1990	50,000	55,000
	FOR ANY OTHER PERSON/FRAUD	1990	250,000	275,000
	FOR NATURAL PERSON/SUBSTANTIAL LOSSES OR RISK OF LOSSES TO OTHERS.	1990	100,000	110,000
	FOR ANY OTHER PERSON/SUBSTANTIAL LOSSES OR RISK OF LOSSES TO OTHERS.	1990	500,000	550,000
	15 USC 78ff(b) EXCHANGE ACT/FAILURE TO FILE INFORMATION DOCUMENTS, REPORTS.	1936	100	110
	15 USC 78ff(c)(1)(B). FOREIGN CORRUPT PRACTICES—ANY ISSUER	1988	10,000	11,000
	15 USC 78ff(c)(2)(C). FOREIGN CORRUPT PRACTICES—ANY AGENT OR STOCKHOLDER ACTING ON BEHALF OF ISSUER.	1988	10,000	11,000
	15 USC 78u-1(a)(3). INSIDER TRADING—CONTROLLING PERSONS	1988	1,000,000	1,100,000
	15 USC 78u-2 FOR NATURAL PERSON	1990	5,000	5,500
	FOR ANY OTHER PERSON	1990	50,000	55,000
	FOR NATURAL PERSON/FRAUD	1990	50,000	55,000
	FOR ANY OTHER PERSON/FRAUD	1990	250,000	275,000
	FOR NATURAL PERSON/SUBSTANTIAL LOSSES TO OTHERS/GAINS TO SELF.	1990	100,000	110,000
	FOR ANY OTHER PERSONS/SUBSTANTIAL LOSSES TO OTHERS/GAIN TO SELF.	1990	500,000	550,000
	15 USC 78u(d)(3). FOR NATURAL PERSON	1990	5,000	5,000
	FOR ANY OTHER PERSON	1990	50,000	55,000
	FOR NATURAL PERSON/FRAUD	1990	50,000	55,000
	FOR ANY OTHER PERSON/FRAUD	1990	250,000	275,000
	FOR NATURAL PERSON/SUBSTANTIAL LOSSES OR RISK OF LOSSES TO OTHERS.	1990	100,000	110,000
	FOR ANY OTHER PERSON/SUBSTANTIAL LOSSES OR RISK OF LOSSES TO OTHERS.	1990	500,000	550,000
	15 USC 80a-9(d). FOR NATURAL PERSON	1990	5,000	5,500
	FOR ANY OTHER PERSON	1990	50,000	55,000
	FOR NATURAL PERSON/FRAUD	1990	50,000	55,000
	FOR ANY OTHER PERSON/FRAUD	1990	250,000	275,000
	FOR NATURAL PERSON/SUBSTANTIAL LOSSES TO OTHERS/GAINS TO SELF.	1990	100,000	110,000
	FOR ANY OTHER PERSON/SUBSTANTIAL LOSSES TO OTHER/GAINS TO SELF.	1990	500,000	550,000
	15 USC 80a-41(e). FOR NATURAL PERSON	1990	5,000	5,500
	FOR ANY OTHER PERSON	1990	50,000	55,000
	FOR NATURAL PERSON/FRAUD	1990	50,000	55,000
	FOR ANY OTHER PERSON/FRAUD	1990	250,000	275,000
	FOR NATURAL PERSON/SUBSTANTIAL LOSSES OR RISK OF LOSSES TO OTHERS.	1990	100,000	110,000
	FOR ANY OTHER PERSON/SUBSTANTIAL LOSSES OR RISK OF LOSSES TO OTHERS.	1990	500,000	550,000
	15 USC 80b-3(i). FOR NATURAL PERSON	1990	5,000	5,500
	FOR ANY OTHER PERSON	1990	50,000	55,000
	FOR NATURAL PERSON/FRAUD	1990	50,000	55,000
	FOR ANY OTHER PERSON/FRAUD	1990	250,000	275,000
	FOR NATURAL PERSON/SUBSTANTIAL LOSSES TO OTHERS/GAIN TO SELF.	1990	100,000	110,000
	FOR ANY OTHER PERSON/SUBSTANTIAL LOSSES TO OTHERS/GAIN TO SELF.	1990	500,000	550,000
	15 USC 80b-9(e). FOR NATURAL PERSON	1990	5,000	5,500
	FOR ANY OTHER PERSON	1990	50,000	55,000
	FOR NATURAL PERSON/FRAUD	1990	50,000	55,000
	FOR ANY OTHER PERSON/FRAUD	1990	250,000	275,000
	FOR NATURAL PERSON/SUBSTANTIAL LOSSES OR RISK OF LOSSES TO OTHERS.	1990	100,000	110,000

U.S. code citation	Civil monetary penalty description	Year penalty amount was last set by law	Original statutory maximum penalty amount	Adjusted maximum penalty amount
	FOR ANY OTHER PERSON/SUBSTANTIAL LOSSES OR RISK OF LOSSES TO OTHERS.	1990	500,000	550,000

PART 202—INFORMAL AND OTHER PROCEDURES

Sec.

202.1 General.

202.2 Pre-filing assistance and interpretative advice.

202.3 Processing of filings.

202.3a Instructions for filing fees.

202.4 Facilitating administrative hearings.

202.5 Enforcement activities.

202.6 Adoption, revision and rescission of rules and regulations of general application.

202.7 Submittals.

202.8 Small entity compliance guides.

202.9 Small entity enforcement penalty reduction policy.

AUTHORITY: 15 U.S.C. 77s, 77t, 78d-1, 78u, 78w, 78ll(d), 79r, 79t, 77sss, 77uuu, 80a-37, 80a-41, 80b-9, and 80b-11, unless otherwise noted.

Section 202.5 is also issued under sec. 20, 48 Stat. 86, sec. 21, 48 Stat. 899, sec. 18, 49 Stat. 831, sec. 321, 53 Stat. 1174, sec. 1, 76 Stat. 394, 15 U.S.C. 77t, 78u, 79r, 77uuu, 80a-41, 80b-9, 78d-1.

Section 202.9 is also issued under section 223, 110 Stat. 859 (Mar. 29, 1996).⁹

SOURCE: 25 FR 6736, July 15, 1960, unless otherwise noted.

§ 202.1 General.

(a) The statutes administered by the Commission provide generally (1) for the filing with it of certain statements, such as registration statements, periodic and ownership reports, and proxy solicitation material, and for the filing of certain plans of reorganization, applications and declarations seeking Commission approvals; (2) for Commission determination through formal procedures of matters initiated by private parties or by the Commission; (3) for the investigation and examination of persons and records where necessary to carry out the purposes of the statutes and for enforcement of statutory provisions; and (4) for the adoption of rules and regulations where necessary to effectuate the purposes of the statutes.

(b) In addition to the Commission's rules of practice set forth in part 201 of

this chapter, the Commission has promulgated rules and regulations pursuant to the several statutes it administers (parts 230, 240, 250, 260, 270 and 275 of this chapter). These parts contain substantive provisions and include as well numerous provisions detailing the procedure for meeting specific standards embodied in the statutes. The Commission's rules and regulations under each of the statutes are available in pamphlet form upon request to the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

(c) The statutes and the published rules, regulations and forms thereunder prescribe the course and method of formal procedures to be followed in Commission proceedings. These are supplemented where feasible by certain informal procedures designed to aid the public and facilitate the execution of the Commission's functions. There follows a brief description of procedures generally followed by the Commission which have not been formalized in rules.

(d) The informal procedures of the Commission are largely concerned with the rendering of advice and assistance by the Commission's staff to members of the public dealing with the Commission. While opinions expressed by members of the staff do not constitute an official expression of the Commission's views, they represent the views of persons who are continuously working with the provisions of the statute involved. And any statement by the director, associate director, assistant director, chief accountant, chief counsel, or chief financial analyst of a division can be relied upon as representing the views of that division. In certain instances an informal statement of the views of the Commission may be obtained. The staff, upon request or on its own motion, will generally present